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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

SPENCER I. JORDAN, AIRMAN,
UNITED STATES NAVY, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTION PRESENTED

1. Does *Minnick v. Mississippi* prohibit the pretrial custodial interrogation of a suspect, without the suspect's attorney present, when the police know that the suspect has consulted with the attorney about the particular offenses?

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SPENCER I. JORDAN, AIRMAN,
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v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Spencer I. Jordan, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals, rendered in this proceeding on September 30, 1993.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals, *United States v. Jordan* (*Jordan II*), No. 58,976, slip op. (C.M.A. Sept. 30, 1993), is reprinted as Appendix A.[1] The opinion of the United States Navy-Marine Corps Court of Military Review, *United States v. Jordan* (*Jordan II*), 35 M.J.

[1] At the time of printing this petition, the Court of Military Appeals' final decision in *Jordan II* had not been submitted to West Publishing for publication.

856 (C.M.A. 1992), is reprinted as Appendix B. The opinion of the United States Court of Military Appeals, *United States v. Jordan* (*Jordan I*), 29 M.J. 177 (C.M.A. 1989), is reprinted as Appendix E. The opinion of the United States Navy-Marine Corps Court of Military Review, *United States v. Jordan* (*Jordan I*), No. 86-1006, slip op. (N.M.C.M.R. June 30, 1987), is reprinted as Appendix F.

JURISDICTION

The United States Court of Military Appeals affirmed the decision of the United States Navy-Marine Corps Court of Military Review on September 30, 1993. 28 U.S.C. § 1259(3) provides jurisdiction in this case and entitles petitioner to seek review of the United States Court of Military Appeals' decision.

CONSTITUTIONAL PROVISION INVOLVED

Amendment V

> No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law. . . .

RULE OF EVIDENCE INVOLVED

Mil. R. Evid. 305(e)

> Notice to counsel. When a person subject to the code who is required to give warnings under subdivision (c) intends to question an accused or person suspected of an offense and knows or reasonably should know that counsel either has been appointed for or retained by the accused or suspect with respect to that offense, the counsel must be notified of the intended interrogation and given a reasonable

time in which to attend before the interrogation may proceed.

STATEMENT OF THE CASE

On October 18-22, 1985, Petitioner was tried by general court-martial. Petitioner and Seaman Thomas Hardnett were charged with killing Petty Officer Gregory Swafford during the course of a robbery and conspiracy to rob him. Petitioner was convicted of felony-murder, unpremeditated murder, robbery, and conspiracy to commit robbery. Arts. 118, 122, and 81, Uniform Code of Military Justice (hereinafter UCMJ), 10 U.S.C. §§ 918, 922, 881, (1982) respectively. Tr. at 436, 437. The trial judge set aside the finding of guilty to unpremeditated murder because it was an offense included within the felony-murder conviction. Tr. at 455. Petitioner was sentenced to life imprisonment, forfeiture of all pay and allowances, reduction to the lowest enlisted pay-grade, and a dishonorable discharge from the Naval Service. Tr. at 453.

On February 3, 1985, Swafford failed to report for duty. Tr. at 258. Swafford's commanding officer asked the Naval Investigative Service (hereinafter NIS) to investigate Swafford's disappearance. Tr. at 45. Agent Cashman was assigned the investigation. Tr. at 45-47. On April 3, 1985, Swafford's body was found within the limits of the City of Chesapeake, Virginia. Tr. at 266. Detective Griggs, Chesapeake Police Department, assumed jurisdiction based on the locus of the body and began a homicide investigation. Tr. at 70-71. Subsequently the body was identified as the missing Swafford, and Detective Griggs and Agent Cashman commenced a joint investigation into Swafford's death. Tr. at 50, 70.

The investigation involved full cooperation between agents of NIS, including Agent Cashman, and Detective Griggs. Witness interviews were divided up between the various investi-

gators. Results of interviews and other information found was pooled. Detective Griggs and Agent Cashman flew on military aircraft to Italy to continue their investigation on board Swafford's ship, including interviews of Petitioner. Tr. at 54, 60, 63. At the request of NIS, the Chesapeake police conducted a polygraph of Hardnett. Tr. at 87. Eventually, Petitioner became a prime suspect. Tr. at 79, 87. On July 26, 1985, Petitioner was returned under NIS escort to Norfolk, Virginia where he was met by Detective Griggs and Agent Cashman. On July 28, 1985, Petitioner was confined in the Norfolk Naval Brig for pretrial confinement on the charges on which he was interrogated and later convicted. Charge Sheet.[2]

On July 30, 1985, Lieutenant S. A. Stallings, a judge advocate, was assigned to represent Petitioner for court-martial charges that might arise as a result of the investigation. Tr. at 125. Stallings was admitted to perform defense counsel duties by the Judge Advocate General of the Navy. Art. 27, UCMJ, 10 U.S.C. § 827 (1982). On July 30, Stallings notified the Navy officials then responsible for prosecuting Petitioner at court-martial that he was Petitioner's lawyer. Tr. at 125. Prior to this appointment, Petitioner had been interviewed several times by Detective Griggs and Agent Cashman.

On July 31, 1985, Stallings had a two hour meeting with Petitioner at the Brig. Tr. at 76, 126. At this meeting they discussed the case, the potential charges, and formed an attorney-client relationship. Tr. at 126. While this meeting was going on, Detective Griggs and Agent Cashman arrived at the Brig with a civilian arrest warrant for Petitioner. Detective Griggs was told he would have to wait to serve the warrant because Petitioner was consulting with his lawyer. Tr. at 76.

[2] A "brig" is a military confinement facility which houses pretrial detainees and persons serving a sentence. Service-members may be placed in pretrial confinement if an initial determination is made that they may have committed an offense triable at court-martial.

Detective Griggs then told Agent Cashman that Jordan's "military attorney had no authority off the military base once [he] served those papers on [Jordan]." *Id.* Meanwhile, Stallings completed his dicussions with Petitioner and left the Brig. At no time did anyone tell Stallings that Detective Griggs and Agent Cashman were there to see Petitioner, or that Petitioner was about to be arrested and transferred, in custody, to the Chesapeake Police Department for further interrogations. Moreover, at no time did Detective Griggs or Agent Cashman seek to clarify the ambiguous situation regarding Petitioner's counsel. Tr. at 126. Detective Griggs and Agent Cashman took Petitioner in custody to Chesapeake Police Headquarters, where they interrogated him. Tr. at 82.

At Chesapeake Police Headquarters, Petitioner was advised of his right to silence and right to counsel. *Miranda v. Arizona*, 384 U.S. 436 (1986). Neither Detective Griggs nor Agent Cashman made any effort to contact Stallings, and they did not tell Petitioner that they would make Stallings available to him. Tr. at 126. At no time after he left the Brig did Petitioner ask to speak to a lawyer, and he waived his right to silence. On July 31, 1985, Petitioner was interrogated by Detective Griggs and Agent Cashman and made the first of several incriminating statements. As a result of Jordan's statements, the Chesapeake Commonwealth's Attorney concluded that the City of Norfolk, Virginia had jurisdiction because the killing occurred in that city. Petitioner was transferred, still in custody, to the Norfolk city jail. On August 3, 1985, Petitioner, after *Miranda* advice and waiver, made another incriminating statement to a Norfolk detective, Detective Hazelette. Tr. at 354-356. Based on facts elicited during this interrogation, Navy officials sought and gained jurisdiction over Petitioner for the purposes of a court-martial prosecution. Tr. at 161.

At trial, Petitioner moved to suppress the July 31 and August 3 statement. Appellate Exhibit I. The judge found that an

attorney-client relationship existed between Petitioner and Stallings on the offenses before the court from the July 31 meeting, that the Government had notice about Stallings' representation, and that Detective Griggs knew or should have known that Petitioner had consulted with a lawyer. Tr. at 168. Nonetheless, the motion to suppress was denied. Tr. at 169.

On review, the Navy-Marine Corps Court of Military Review affirmed Petitioner's conviction and sentence. *United States v. Jordan*, No. 86-1006, slip op. (N.M.C.M.R. June 30, 1987). The U.S. Court of Military Appeals (hereinafter USCMA) then affirmed by a 2-1 vote, Chief Judge Everett dissenting. *United States v. Jordan*, 29 M.J. 177 (C.M.A. 1989). On December 10, 1990, this Court granted a petition for writ of certiorari, vacated the judgment, and remanded the case to the USCMA "for further consideration in light of *Minnick v. Mississippi*, 498 U.S. [146] (1990)." *Jordan v. United States*, 498 U.S. 1009 (1990). The USCMA remanded the case to the Navy-Marine Corps Court of Military Review. *United States v. Jordan*, 32 M.J. 376 (C.M.A. 1991). Both courts affirmed the conviction and sentence, USCMA by a 3-2 vote. *United States v. Jordan*, No. 58,976, slip op. (C.M.A. Sept. 30, 1993); *United States v. Jordan*, 35 M.J. 856 (N.M.C.M.R. 1992).

Judge Cox, in writing for the USCMA, stated, "At no time prior to or during the making of these statements did appellant ever invoke a right to counsel in any way to any official, Naval or civilian." Slip op. at 4. He also stated that, "notwithstanding the Naval attorney's meeting with appellant at the brig, *Miranda*, *Edwards*, and *Minnick*, were scrupulously honored." *Id.* at 5.

In his dissent, Chief Judge Sullivan reasoned that the circumstances surrounding the meeting between Petitioner and his attorney, and the fact that the Naval and civilian authorities were aware that petitioner had spoken with the attorney on the

pending charges indicated that Petitioner had "asserted his Fifth Amendment right to counsel while in custody but prior to actual interrogation." Slip op. at 9. Accordingly, in his view the statements of July 31 and August 3 were obtained in violation of *Minnick*.

Judge Wiss, in a separate dissent, wrote that he agreed with the majority that Petitioner failed to invoke his Fifth Amendment right to counsel because he did not request a lawyer, but he believed that Military Rule of Evidence 305(e)[3] was violated and that the contested statements should have been excluded. Because the investigation by NIS and the civilian police had merged, Judge Wiss would have ruled that a failure to comply with Rule 305(e) made Petitioner's July 31 and August 3 statements inadmissible at court-martial.

REASON FOR GRANTING THE WRIT

In *Miranda v. Arizona*, 384 U.S. 436 (1986), this Court decided that if a suspect being interrogated by the police "indicates *in any manner*" that he wants an attorney, interrogation must cease. *Miranda*, 384 U.S. at 474 (emphasis added). The suspect is not then subject to further interrogation until counsel has been made available. *Edwards v. Arizona*, 451 U.S. 477, 484 (1981). Once a suspect invokes the right to

[3] Military Rule of Evidence 305(e) provides:

> *Notice to Counsel.* When a person subject to the code who is required to give warnings under subdivision (c) intends to question an accused or person suspected of an offense and knows or reasonably should know that counsel either has been appointed for or retained by the accused or suspect with respect to that offense, the counsel must be notified of the intended interrogation and given a reasonable time in which to attend before the interrogation may proceed.

MANUAL FOR COURTS-MARTIAL, United States, Mil. R. Evid. 305(e) (1984).

counsel, counsel must be present before police may reinitiate interrogation of the suspect. *Minnick v. Mississippi*, 498 U.S. 146, 153 (1990).

Detective Griggs and Agent Cashman knew Petitioner had just spent two hours talking to a lawyer about the Swafford murder investigation. The investigators then knew of an ambiguity in Petitioner's desire regarding the assistance of counsel, be it facts surrounding "invocation" or "authority" of counsel. The investigators ought to have been under an obligation, before reinitiating questioning, to inquire further and clarify Petitioner's desire for counsel.

There are three conflicting standards to determine the consequences of an ambiguous request for counsel during custodial interrogation. *Smith v. Illinois*, 469 U.S. 91, 95-96 & n.3 (1984). Under the first standard, all questioning must cease at any mention of the word "lawyer," "counsel" or "attorney." *See, e.g., Maglio v. Jago*, 580 F.2d 202, 205 (6th Cir. 1978). Under the second standard, questioning should cease once the suspect has clearly asserted a right to counsel. *See, e.g., Mueller v. Commonwealth*, 244 Va. 386, 422 S.E.2d 380, 387 (1992), *cert. denied*, 113 S. Ct. 1880 (1993). The court below seems to have applied this standard in Petitioner's case. Under the third standard, general questioning should cease when there is an ambiguous request for counsel. But, police may then narrowly tailor their questions to clarify the ambiguous request or acts. *See United States v. Porter*, 764 F.2d 1 (1st Cir. 1985), *reh'g denied*, 776 F.2d 370 (1st Cir. 1985) ("where the accused's words *and actions* are ambiguous as to whether he wishes a lawyer . . . the questioning officers must find out more specifically whether he wants a lawyer before they can proceed further with other questioning.") (emphasis added); *see also United States v. Mendoza-Cecelia*, 963 F.2d 1467, 1472 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 436 (1992); *United States v. Davis*, 36 M.J. 337, 341 (C.M.A. 1993), *cert. granted*, 114 S. Ct. 379 (1993).

The Court has before it an analogous issue of ambiguity in *Davis*. That case involves clarification of the ambiguity inherent in the statement, "Maybe I should talk to a lawyer." *Davis*, 36 M.J. at 341. In apparently applying a clear assertion standard the court below failed to apply the correct test. The court should have applied the clarification test to these ambiguous circumstances.

CONCLUSION

Petitioner asks this Court to resolve the issue of what standard applies to determine the resolution of ambiguous circumstances surrounding requests for counsel during a custodial interrogation.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

No. 58,976
CMR No. 86 1006R

UNITED STATES, APPELLEE

v.

SPENCER I. JORDAN, AIRMAN
U.S. NAVY, APPELLANT

Argued March 2, 1993
Decided September 30, 1993

Counsel

For Appellant: *Captain Dwight H. Sullivan, USMC* (argued).

For Appellee: *Lieutenant Commander Lawrence W. Muschamp, JAGC, USN* (argued); *Colonel T. G. Hess, USMC* and *Commander W. F. Shields, JAGC, USN* (on brief).

Military Judge: ALVIN S. TRANSEAU

OPINION OF THE COURT

COX, Judge:

Appellant was convicted of murdering a shipmate, and of robbing and conspiring to rob him.[1] The murder and

[1] Appellant was charged with violations of Articles 81, 122, and 118, Uniform Code of Military Justice, 10 USC §§ 881, 922, and 918, respectively. His approved sentence includes a dishonorable discharge, confinement for life, total forfeitures, and reduction to E-1.

robbery occurred within the territorial limits of the City of Norfolk, Virginia; the body was dumped into a river within the territorial limits of the City of Chesapeake, Virginia. This case concerns admissibility of two statements made by appellant to law enforcement officials of those municipalities in conjunction with their investigations into appellant's crimes.

When this case was initially before us, on September 28, 1989, we affirmed, resolving numerous evidentiary questions against appellant regarding the two statements. 29 MJ 177. On December 10, 1990, the United States Supreme Court granted appellant's petition for *certiorari*, vacated our judgment, and remanded the case to us for further consideration in light of its then-new decision in *Minnick v. Mississippi,* 498 U.S. 146 (December 10, 1990). *Jordan v. United States,* 498 U.S. 1009.

We, in turn, set aside the decision of the Court of Military Review and remanded the case to it, noting that

> we have reexamined the decision of the United States Navy-Marine Corps Court of Military Review and our opinion in this case and consider it appropriate, in the first instance, that the Court of Military Review should have the initial opportunity to review this case in light of *Minnick*.

32 MJ 376 (1991).

On remand, the Court of Military Review again affirmed, holding that *Minnick* afforded appellant no relief. 35 MJ 856 (NMCMR 1992). We agree with the Court of Military Review, and we again affirm.

In *Miranda v. Arizona,* 384 U.S. 436 (1966), the Supreme Court ruled, *inter alia,* that the Fifth Amendment privilege against self-incrimination requires that a

suspect in custody be clearly informed, prior to interrogation, that he has a right to remain silent and that anything he says may be used against him in court. In addition, the suspect must be clearly informed that he has a right to consult with counsel and to have counsel with him during the interrogation, and that, if he is indigent, an attorney will be appointed to represent him. 384 U.S. at 467-72.

Of particular significance to this appeal, the Court also stated:

> Once warnings have been given, the subsequent procedure is clear. *If the individual indicates in any manner, at any time prior to or during the questioning, that he wishes to remain silent, the interrogation must cease.*

384 U.S. at 473-74 (emphasis added).

Edwards v. Arizona, 451 U.S. 477 (1981), represented an extension of *Miranda*. In *Edwards*, the defendant was taken into custody and advised of his rights. At some point, Edwards indicated a willingness to "make a deal," but he wanted an attorney first. 451 U.S. at 479. Questioning ceased at this point, and Edwards was taken to the county jail for the night. The next morning, two detectives went to the jail and readvised Edwards of his rights; Edwards eventually confessed, having seen no lawyer.

The Supreme Court held that

> *when an accused has invoked his right to have counsel present* during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, *having expressed his desire to deal with the police only*

> *through counsel,* is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversation with the police.

451 U.S. at 484-85 (emphasis added).

Minnick v. Mississippi, supra, represents a clarification of *Edwards.* Minnick was questioned by police in jail; he also invoked his right to counsel. Thereafter, appointed counsel actually met with Minnick at the jail. Later, law enforcement officers returned, readvised Minnick of his rights, and Minnick confessed. 498 U.S. at 148-49. The Supreme Court held that the officers could not, under the Fifth Amendment, reinitiate interrogation of Minnick unless Minnick's attorney was present. *Id.* at 152. The fact that the attorney had seen Minnick did not remove the protections of *Miranda* and *Edwards.*

The facts of the instant case, however, differ significantly from those of *Minnick.* Here, despite numerous rights-advisements, appellant never invoked his right to counsel until after the statements in issue had been taken. *See* 29 MJ at 178-83. Notwithstanding this lack of invocation, Naval defense counsel was assigned to appellant while appellant was still under Naval control.[2] This ap-

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[2] Since the murder and robbery had been committed off-post, Naval jurisdiction over the offenses was not obvious at this critical juncture of the investigation, and military charges were not instituted at this point. *See O'Callahan v. Parker,* 395 U.S. 258 (1969); *Relford v. Commandant,* 401 U.S. 355 (1971). A few days later, after appellant had been released to the custody of civilian officials but not yet indicted, those officials obtained appellant's admission that the plot to rob the deceased was hatched previously on board the Naval installation. This admission strengthened the argument for Naval jurisdiction, and the case was ultimately returned to the Navy for prosecution. Despite this additional evidence of "service-connection," ap-

pointment was apparently triggered by appellant's brief detention in a Navy brig pending completion of the civilian investigation. Naval counsel duly met with appellant at the brig just prior to service of the civilian arrest warrant. After this meeting, the civilian warrant was served, and appellant was released to the custody of civilian officials for the purpose of prosecution.

Appellant was subsequently advised of his Fifth Amendment *Miranda* rights by civilian officials. It is undisputed that appellant waived his rights and agreed to talk with the civilian law enforcement officials. In the course of those interrogations, he made the admissions here in issue. *At no time prior to or during the making of these statements did appellant ever invoke a right to counsel in any way to any official, Naval or civilian. See* 29 MJ at 188 and 35 MJ at 862. *Cf. Moran v. Burbine,* 475 U.S. 412, 422-23 (1986). Each and every time appellant was advised of his rights, he waived them and agreed to make a statement. Thus, notwithstanding the Naval attorney's meeting with appellant at the brig, *Miranda, Edwards,* and *Minnick* were scrupulously honored. Under the circumstances, we agree with the Court of Military Review that *Minnick v. Mississippi, supra,* provides appellant no relief.

Regarding the other claims and theories raised by appellant in conjunction with this return, we are satisfied with our treatment of them in our first opinion and with their treatment by the Court of Military Review.

The decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

Judges CRAWFORD and GIERKE concur.

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pellant's first pretrial motion was to dismiss the charges due to an alleged lack of subject-matter jurisdiction. The subject-matter jurisdiction debate was ultimately removed by the Supreme Court in *Solorio v. United States,* 483 U.S. 435 (1987).

SULLIVAN, Chief Judge (dissenting):

I disagree with the holding of the majority opinion and its reliance on the Court of Military Review's decisions in this case. *United States v. Jordan,* 35 MJ 856 (NMCMR 1992); *United States v. Jordan,* No. 86-1006, (NMCMR June 30, 1987) (unpublished). The Supreme Court remanded appellant's case to our Court "for further consideration in light of *Minnick v. Mississippi.*" *United States v. Jordan,* 498 U.S. 1009 (1990). We remanded it to the Court of Military Review for the same purpose. *United States v. Jordan,* 32 MJ 376 (CMA 1991). Restatement by the Court of Military Review of its initial decision that appellant never asserted his Fifth Amendment right to counsel is unresponsive to this remand. After all, *Minnick v. Mississippi,* 498 U.S. 146, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990), is a decision which addresses whether the police may interrogate a suspect in custody outside the presence of counsel *after he has exercised his Fifth Amendment right to counsel* and briefly consulted that counsel. *Cf. Patterson v. Illinois,* 487 U.S. 285, 290-92, 108 S.Ct. 2389, 290-92, 101 L.Ed.2d 261, 272-72 (1988) (Supreme Court recognized that suspect never exercised his right to counsel.)

The Court of Military Review's regressive approach to a Supreme Court remand is reminiscent of another military case remanded by the Supreme Court to this Court for reconsideration. *See United States v. Goodson,* 18 MJ 243 (CMA 1984), cert. granted and vacated, 471 U.S. 1063, 105 S.Ct. 2129, 85 L.Ed.2d 493 (1985) remanded 22 MJ 22 (CMA 1986) (decision of ACMR reversed). There, this Court initially concluded that a suspect's request for counsel made prior to the commencement of interrogation but while in custody did not bring *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) into

play. In our second decision on remand, however, we discarded our earlier holding to the extent that it ignored an "anticipatory" invocation of counsel by a suspect in custody. *See McNeil v. Wisconsin,* 111 S.Ct. 2204, 2211 n.3 (1991).

Turning to the present case, I note that a joint and continuous investigation of appellant for Petty Officer Swafford's murder had begun in April 1985, involving both Special Agent Cashman of the Naval Investigative Service and Detective Griggs of the Chesapeake Police Department. Moreover, appellant was placed in pretrial confinement for this offense by military authorities on July 28, 1985. Finally, I note that RCM 305(e), Manual for Courts-Martial, United States, 1984, provides:

> (e) *Advice to the accused upon confinement. Each person confined shall be promptly informed of*;
>
> (1) The nature of the offenses for which held:
>
> (2) The right to remain silent and that any statement made by the person may be used against the person;
>
> (3) The right to retain civilian counsel at no expense to the United States, and *the right to request assignment of military counsel*; and
>
> (4) The procedures by which pretrial confinement will be reviewed.
>
> (f) Military counsel. *If requested by the prisoner, military counsel shall be provided to the prisoner before the initial review under subsection (1) of this rule.* Counsel may be assigned for the limited purpose of representing the accused only during the pretrial confinement

> proceedings before charges are referred. If assignment is made for this limited purpose, the prisoner shall be so informed. Unless otherwise provided by regulations of the Secretary concerned, a prisoner does not have a right under this rule to have military counsel of the prisoner's own selection.

(Emphasis added.)

The Court of Military Review made the following findings of fact concerning what happened next:

On July 28, appellant was ordered into pretrial confinement by military authorities. In the afternoon of July 30, Lieutenant Stephen A. Stallings, JAGC, USN, received notification that he had been appointed appellant's defense counsel. He met with appellant in the brig the next morning, July 31, for approximately 2 hours. He had already been informed that the civilian authorities might be taking jurisdiction in the case.

While Lieutenant Stallings was talking with appellant, Detective Griggs arrived at the brig with a Chesapeake warrant for appellant's arrest. After Stallings departed-he was unaware of Griggs' presence at the brig-the military authorities released appellant into Griggs' custody. Griggs knew appellant had a military attorney, but believed "that his military attorney had no authority off the military base once . . . [Griggs] served those papers on" appellant. Military charges were not, at that time, preferred against appellant.

The same day, July 31, Griggs took appellant to Chesapeake police headquarters, where he advised him of his rights to remain silent and to counsel under *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and the Fifth Amendment to the United States

> Constitution. Appellant waived his rights and agreed to talk to Griggs without counsel present. Neither Griggs nor appellant mentioned Lieutenant Stallings.
>
> Thereafter, Griggs interrogated appellant in a tape-recorded interview; the content of the interview was transcribed, and appellant swore under oath that it was a true statement. In this statement, appellant made the following admissions:

In my opinion, this record shows that appellant asserted his Fifth Amendment right to cousel while in custody but prior to actual interrogation. *See United States v. Goodson, supra.* Detective Griggs thus violated *Minnick v. Mississippi, supra,* when he interrogated appellant outside the presence of Lieutenant Stallings, his assigned military defense counsel. *See generally* LaFave and Israel, *Criminal Procedure* § 6.9(e)(1991).

It is not disputed in this case that appellant, when taken into custody for this murder offense, was apprised of his right to counsel. Moreover, counsel was assigned to him subsequent to this rights advisement. He also formed an attorney-client relationship with this defense counsel and engaged in a two-hour consultation with him *about this offense. See United States v. Porter,* 764 F.2d 16 (1st Cir. 1985) (suspect in custody asserted his right to counsel by making two phone calls to his attorney); *cf. Delap v. Dugger,* 890 F.2d 285, 291 (11th Cir. 1989) (suspect only said lawyer represented him on another matter). Finally, Detective Griggs was fully apprised of this consultation and relationship as to this offense but disregarded it as irrelevant because of counsel's military status. *Id.; cf. Werner v. Arn,* 819 F.2d 613, 616 (6th Cir. 1967) (police not apprised of phone call attempting to contact her attorney).

In *Miranda,* the Supreme Court stated:

> Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntary, knowingly, and intelligently. *If however, he indicates in any manner and at any state of the process that he wishes to consult with an attorney before speaking there can be no questioning.*

384 U.S. at 444, 86 S.Ct. at 1612, 16 L.Ed.2d 694 (emphasis added). *See Smith v. Illinois,* 469 U.S. 91, 105 S.Ct. 490, 83 L.Ed.2d 488 (1966).

Futhermore, in *Edwards,* the Supreme Court unequivocally held that once the accused requests counsel, all questioning must stop and he may not be approached for further interrogation "until counsel has been made available" to him. 451 U.S. at 484-485, 101 S.Ct. at 1884-85. Finally, in *Minnick, a decision released after our initial opinion in this case,* the Supreme Court "decline[d] to remove protection from police-initiated questioning based on isolated consultations with counsel who is absent when the interrogation resumes." 111 S.Ct. at 491.

The key to this case for me is *Minnick v. Mississippi, supra.* For the first time the Supreme Court held that the police may not reinitiate interrogation *outside the presence of counsel* after a suspect has asserted his Fifth Amendment right to counsel and briefly consulted with counsel. *See McNeil v. Wisconsin,* 111 S.Ct. 2204, 2208 (1991). This is the law even if the suspect is again advised of his rights and waives them. Although *Minnick v. Mississippi,*

supra, was not decided at the time of my earlier opinion in this case, it is a bright-line rule which I cannot now ignore.

Accordingly, absent a determination of harmless error, *see Arizona v. Fulminante*, 111 S.Ct. 1246 (1991), I would order a rehearing.

WISS, Judge (dissenting):

Four years ago, a divided vote of this Court affirmed appellant's conviction in a 3-opinion decision (Judges Cox and Sullivan affirming and then-Chief Judge Everett dissenting). 29 MJ 177 (1989). Subsequently, the Supreme Court of the United States granted Jordan's petition for writ of certiorari, "vacated" the "judgment" of this Court, and remanded the case to this Court "for further consideration in light of [the intervening decision in] *Minnick v. Mississippi,* 498 US ____, 111 S.Ct. 486, ____ L.Ed.2d ____ (1990)." 111 S.Ct. 575.

This Court, in turn, decided that it was "appropriate, in the first instance, that the Court of Military Review should have the initial opportunity to review this case in light of *Minnick.*" Accordingly, the Court "set aside" the earlier decision of the court below and remanded the case "to that court for further review." 32 MJ 376 (1991).

Back in the Court of Military Review, some dispute arose concerning the scope of its review at that point. The court first granted appellant's motion to file additional errors of law; however, in its ultimate decision, 35 MJ 856 (1992), the majority (Freyer, J., dissenting on this point) reversed its field and concluded that "it must confine its review to matters within" the limits of the remand from this Court. *Id.* at 861. The court noted that neither the Supreme Court nor this Court had questioned any aspect of that court's earlier review except as to how *Minnick* might affect its consideration and that, accordingly, its earlier decision and the original decision of this Court remained the law of the case, with that sole limitation.

In the remand order, this Court has instructed that, thereafter, "the record will be returned directly to this

Court." 32 MJ 376. Accordingly, after the Court of Military Review had issued its decision on remand, it was not necessary for appellant to petition for review. In lieu of that, this Court promulgated an order on September 22, 1992, vacating the earlier, erroneous docketing of this appeal (*see* 36 MJ 368 (Daily Journal, September 9, 1992)); giving notice that the record had been retunred to the Clerk's office; and indicating that the case thus "has been referred to the Court for further consideration." 36 MJ 381 (Daily Journal). On October 19, 1992, this Court published an order permitting appellant to file "an additional brief on or before November 30, 1992," and permitting appellee to "file an answer within 30 days thereafter." 37 MJ 22 (Daily Journal).

In appellant's brief that was filed in response to that invitation, he argued not only the Fifth-Amendment/ *Minnick* issue (Issue II in his brief) but also four others (Issues I, III, IV, and V). Those issues are as follows:

> I. WHETHER MILITARY RULE OF EVIDENCE 305(e), WHICH GENERALLY REQUIRES THAT COUNSEL BE NOTIFIED BEFORE A SUSPECT IS INTERROGATED, WAS VIOLATED IN THIS CASE.
>
> III. WHETHER THE FORCE JUDGE ADVOCATE ERRED BY ADVISING THE CONVENING AUTHORITY THAT APPELLANT HAD BEEN CONVICTED OF A MURDER SPECIFICATION WHICH HAD ACTUALLY BEEN DISMISSED.
>
> IV. WHETHER THE NAVY-MARINE CORPS COURT'S OPINION WAS INVALID

BECAUSE, ON THE DATE OF THE OPINION'S ISSUANCE, THE PANEL WHICH DECIDED THE CASE CONSISTED OF ONLY TWO JUDGES.

V. WHETHER THE MILITARY JUDGE'S APPOINTMENT BY THE JUDGE ADVOCATED GENERAL VIOLATED THE APPOINTMENTS CLAUSE, THUS INVALIDATING THE PROCEEDINGS WHICH RESULTED IN APPELLANT'S CONVICTION AND SENTENCE.

With the case in this posture, I believe that the predicate issue to our consideration of this appeal is the scope of our review: Specifically, is this Court's review limited to the *Minnick* issue that occasioned the remand from the Supreme Court; and, if so, is that limitation a mandatory one or, instead, one that is within the Court's discretion? I conclude that an appellate court to whom a case is remanded with clear instruction to reconsider in light of a particular case or issue generally *must* limit itself to that issue and consider its earlier decision the law of the case in other respects, *see United States v. Montesinos,* 28 MJ 38 (CMA 1989), but that other closely related issues *may* be considered in the Court's *discretion* where the record is adequately developed to permit it, *see United States v. Sager,* 36 MJ 137 (CMA 1992). In my view, under this standard this Court can and should consider Issue I, concerning an alleged violation of Mil.R.Evid. 305(e), Manual for Courts-Martial, United States, 1984, but that we cannot consider the matters raised in Issues III, IV, and V.

Moving, then, to the merits of the appeal, I agree with the majority that, as to the *Minnick* issue, there is no evidence in the record that appellant triggered his Fifth

Amendment right to counsel by requesting a lawyer in any way. However, I believe that the more protective Mil.R.Evid. 305(e) was violated here: The military and civilian investigations had merged early on and had continued, not on "parallel tracks" as the Government suggests but, instead, on the *same train and on the same track*. Accordingly, Agent Cashman of the Naval Investigative Service had an obligation to ensure the presence of appellant's military defense counsel during the interrogation in issue by Detective Griggs and, further, that the second civilian interrogation was the poisoned fruit of that first one.

I

As I mentioned earlier, the threshhold question in this Court relates to the scope of review. The Court of Military Review first granted appellant's motion on remand to consider issues other than the *Minnick* issue cited in our remand order; then, however, in its opinion, the majority concluded that any non-*Minnick* issue was outside the legally permissible scope of its review under this Court's order and that, except for the *Minnick* issue, the decisions of that court and this one were the law of the case.[1] The majority of that court, though, gratuitously opined that its earlier decision on the Mil.R.Evid. 305 issue would not

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[1] As to the other, non-*Minnick* issues raised by appellant in this Court, the majority expresses its satisfaction "with their treatment by the Court of Military Review." ____ MJ at (5). I am unsure whether this means that the majority agrees with the court below that they could not consider those issues or whether it means that the majority concludes that there is no merit to them.

change, in any event, and explained its reasoning. Judge Freyer disagreed and concluded that, since this Court had "set aside" the Court of Military Review's original decision, that court had the authority to fully review the case before it.

Appellant cites *Creighton v. Anderson,* 922 F.2d 443, 449 (8th Cir. 1990), to support his assertion that the lower court's limitation on its scope of review was erroneous. That opinion, indeed, does contain some sweeping language to the effect that a "vacated" opinion simply does not exist in legal effect. Notwithstanding, certain analogies suggest to the contrary *where the vacation order is not, in context, unlimited.*

For instance, 5 Am Jur 2d, Appeal and Error § 947 at 374, states: "The modification of a judgment, or its reversal in part, as distinguished from an absolute and unqualified reversal, does not obliterate the original judgment . . ." Further, § 953 of the same volume and subject instructs:

> In a proper case where the error relates only to separable issues covered by the judgment, it may be reversed as to those issues without reversing the judgment in its entirety. The unaffected parts must be deemed a final judgment of the facts and rights which they determine. There may, however, be cases of appeal from a part of a judgment where the part appealed from is so interwoven and connected with the remainder, or so dependent thereon, that the appeal affects the other parts or involves a consideration of the whole, and is really an appeal from the whole; in such case, if a reversal is ordered it should extend

> to the entire judgment. The appellate court in these cases has power to do that which justice requires, and may extend its reversal as far as may be necessary to accomplish that end.

(Footnote omitted.) *See also id.* § 964 ("When error exists as to only one or more issues and the judgment is in other respects free from error, a reviewing court may, when remanding the cause for a new trial, whether by the court or a jury, limit the new trial to the issues affected by the error" where such limitation is possible and will not work an injustice because the issues to be tried are separable from the other issues.).

These analogies accurately reflect this Court's general position on the question in *United States v. Montesinos, supra.* At several points in that opinion, this Court used rather strong language to, I suggest, make the following points: First, reviewing authorities in the military justice system have their full statutory powers as a case moves *up* the statutory ladder of review; second, however, if the case ever has to move *down,* those authorities have only the power that is expressly given it by the higher authority. For example, the Court stated at one point: "If this Court remands a case to the Court of Military Review, that court can only take action that conforms to the limitations and conditions prescribed by the remand." 28 MJ at 44.

Accordingly, I believe that the general principle may be stated thus: A vacation normally obliterates the earlier decision below; however, where the *context* of that vacation or set aside clearly *limits* the purpose for the remand, that purpose restricts the legal power of the lower authority.

The single exception to this principle of restriction would appear to be that suggested in the excerpt from § 953, above, which this Court did expressly follow in

United States v. Sager, 36 MJ at 140-41. There, the granted issue questioned the admissibility of evidence in light of Article 31, UCMJ, 10 USC § 831. However, the Court noted that, of the four other theories urged in appellant's brief (*i.e.,* Mil.R.Evid. 305, Fifth Amendment, etc.), several were encompassed within appellant's trial objection. Deciding to consider and resolve *all* of the closely related issues, the Court observed:

> Arguably, all of the above arguments fit somewhere within defense counsel's initial objections at his court-martial. Moreover, the evidence of record is adequate to decide these questions, although neither the judge at trial nor the Court of Military Review can be faulted for failing to address specific objections not particularly raised before them.

36 MJ at 141.

Applied to the remand orders in this case, the general principle would seem to limit the scope of review, both in the Court of Military Review and in this Court, to the *Minnick* issue. While the Supreme Court used the verb "vacated" and this Court used the verb "set aside," in context it is ineluctably clear that the purpose of each remand was limited, that is: to further consider the case "in light of *Minnick v. Mississippi.*"

The sole caveat to that principle, however, would seem to suggest that, in light of a number of unusual factors, it is permissible and appropriate for this Court to review the first issue raised by appellant, which addresses the question whether his right to presence of counsel under Mil.R.Evid. 305(e) was violated. First, and most importantly, the issue is closely related to the *Minnick* issue, *see United States v. Sager,* 36 MJ at 140-41; indeed, the Government candidly acknowledges in its brief (Answer to

Final Brief at 36 n.16) that the Mil.R.Evid. 305 issue actually was part of the issue originally granted review in this case and that Chief Judge Everett actually was the one who treated it as a Fifth Amendment issue. Moreover, the first opinion of this Court was sharply divided; since then, this Court has expanded from 3 to 5 judges, with the concurrent possibility going into our deliberations that the Court might well reach a different conclusion on that issue. Finally, it cannot be gainsaid that the apparent importance (and potential merit) of the issue is substantial.

By contrast, however, Issues III, IV, and V are wholly unrelated to the purpose of the remand from the Supreme Court or this Court's remand to the Court of Military Review. Accordingly, they cannot—and, in any event, they should not—be further considered; appellant already has had his full statutorily-envisioned appellate review of his court-martial, with the single remaining task being to resolve the *Minnick* and *Minnick*-related issues.

II

Minnick Issue

Justice Kennedy wrote for the majority in *Minnick*. He first reminded us that the Court in *Edwards v. Arizona,* 451 U.S. 477 (1981), had held that an accused in custody who had invoked his Fifth Amendment right to counsel may not be approached for further interrogation "until counsel has been made available to him." Justice Kennedy continued that the Court believed that a fair reading of *Edwards* and its progeny is that the bar to further police-initiated questioning exists unless counsel actually is *with* the accused during the subsequent questioning. In any event, the Court continued:

> Whatever the ambiguities of our earlier cases on this point, we now hold that when counsel is re-

> quested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney.

111 S.Ct. at 491.

Minnick, however, did nothing to the preexisting law that the *trigger* for *any* of these protections is a *request* for counsel. The Court in *McNeil v. Wisconsin,* 111 S.Ct. 2204, 2209 (1990), made clear that, in order to constitute such a request, the Fifth Amendment "requires, at a minimum, some statement that can reasonably be construed to be expression of a desire for the assistance of an attorney *in dealing with custodial interrogation by the police.*"

There is no direct evidence that appellant requested Fifth-Amendment counsel at *any* time. Indeed, prior to every interrogation, he waived his rights. As to precisely how Lieutenant Stallings actually got into the case at the RCM 305-hearing stage, he testified that he was told by his superior in the defense office that he had "been assigned to represent Jordan on the murder charge." There is no evidence as to *who* had assigned Stallings (for instance, the staff judge advocate did not know about it – *Stallings* told *him* about the assignment); what "assigned" *meant* (*see* the *McNeil* discussion, *infra*); or what had *triggered* that "assignment" (*i.e.*, a request from Jordan).

Instead, to fill the void in direct evidence, appellant relies upon two theories to meet this requirement that he must in some manner request a lawyer in order to trigger the *Minnick* right; both reflect theories raised by the *Jordan I* dissent.

First: RCM 305(f), Manual, *supra,* provides that, "*[i]f requested by the prisoner,* military counsel shall be provided to the prisoner before the initial [pretrial confinement]

review under . . . this rule"; from this counsel asserts that, since defense counsel was in fact provided Jordan, he must have *requested* it, assuming regularity and compliance with regulations. The flaw in this logic is that the inferred conclusion (that Jordan requested counsel) does not necessarily flow from the premise (the rule). RCM 305(f) does require counsel if the prisoner requests; it does *not*, however, *limit* the occasion on which counsel might be provided. Thus, the fact that counsel *is* proivded for RCM 305 purposes, without more, does not ineluctably lead to the conclusion that Jordan *requested* him.

As a tangent to this theory, Judge Everett in his *Jordan I* dissent—after inferring that Jordan had requested counsel—speculated:

> Even if the request for counsel had been made only with respect to review of pretrial confinement, I believe that it would constitute a request for counsel within the meaning of *Edwards*. By his request—whatever its form—Jordan made clear his state of mind that, in connection with the murder investigation and any related proceedings, he wished to have the assistance of a lawyer.

29 MJ at 191.

After that was written, however, the Supreme Court decided *McNeil*, in which the Court held that, just because a *Sixth* Amendment counsel is requested (there, a counsel to help him at a bail hearing, similar to our RCM 305 hearing, coincidentally enough), the accused is *not* necessarily signaling a state of mind that he needs a lawyer as a buffer during interrogation so as to give rise to a *Fifth* Amendment right to counsel. Thus, *McNeil* indicates that, even *if* Jordan had asked for an RCM 305 counsel, he did *not* thereby invoke his *Fifth Amendment* right to counsel.

Second: Counsel next argues that the "assignment" of Stallings and Jordan's acceptance of his services constitute the "functional equivalent" of a request for counsel so that *Minnick* is triggered. In other words, if the police know that a suspect in custody actually has consulted with a lawyer, that triggers *Minnick's* instruction that counsel must be present before interrogation. The flaw in this theory simply is that the Supreme Court has never said that; indeed, the *McNeil* decision clearly would suggest to the contrary. *Cf. United States v. Sager, supra; Moran v. Burbine,* 475 US 412 (1986)(where, unbeknownst to accused, lawyer hired for accused by someone else, police did not deprive accused of his Fifth Amendment right by continuing questioning rather than letting lawyer in – accused had not asked for a lawyer).

Furthermore, while appellant's argument might be sensible *after* a Sixth-Amendment right arises, it makes no sense *prior* to that time. It is not unreasonable to require an in-custody suspect, at a point *before* the Sixth Amendment right arises, to *say* he wants a lawyer before that questioning must stop.

Thus, in the absence of any evidence – direct or inferential – that appellant ever requested Fifth Amendment counsel, I believe that his rights under that provision were not violated.[2]

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[2] Chief Judge Sullivan in dissent asserts that "any suggestion that appellant's consultation with Lieutenant Stallings was not at appellant's request and therefore not an invocation of his right to counsel is both unsupported in the record and patently contrary to the law of this land. *See Minnick v. Mississippi, supra* . . . ." ___ MJ at (2). As to whether such a "suggestion" is contrary to the record, I confess that I have been at a loss to find any evidence in the record to indicate that appellant's consultation with Stallings was at appellant's request. As to whether the law of the land compels the conclusion that the mere fact that Stallings and appellant conferred rendered such a

Mil.R.Evid. 305(e) Issue

In *United States v. McOmber,* 1 MJ 380 (CMA 1976), this Court confronted a case in which "the concern is whether an attorney once appointed or retained to represent a military suspect must first be contacted by investigators who have notice of such representation when they wish to question the suspect." *Id.* at 382. Of course, if the attorney is in the case because the suspect has invoked his Fifth Amendment right, *Minnick* now says yes; otherwise, though, the question is viable. This Court answered:

> We therefore hold that once an investigator is on notice that an attorney has undertaken to represent an individual in a military criminal investigation, further questioning of the accused without affording counsel reasonable opportunity to be present renders any statement obtained involuntary under Article 31(d) of the Uniform Code.

1 MJ at 383. We reasoned:

> To permit an investigator, through whatever device, to persuade the accused to forfeit the assistance of his appointed attorney outside the presence of counsel would utterly defeat the congressional purpose of assuring military defendants effective legal representation without expense. Article 27, ...

When the Military Rules of Evidence were written, Mil.R.Evid. 305 was drafted to conform to *McOmber*'s interpretation – Drafters' Analysis, Manual for Courts – Martial, United States, 1969 (Revised edition) at

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consultation a request for counsel under the Fifth Amendment,' the Supreme Court has made it clear that the "law of the land" is in the other direction, *see McNeil v. Wisconsin,* 111 S.Ct. 2204 (1990).

A18-28 (Change 3)(1980)—and application of Articles 27 and 31. 305(e) provides:

> When a person subject to the code who is required to give warnings under subdivision (c) intends to question an accused or person suspected of an offense and knows or reasonably should know that counsel either has been appointed for or retained by the accused or suspect with respect to that offense, the counsel must be notified of the intended interrogation and given a reasonable time in which to attend before the interrogation may proceed.

This Court has held that "a person subject to the code" includes not just the obvious but also civilian investigators when "the scope and character of the cooperative efforts demonstrate 'that the two investigations merged into an indivisible entity.' " *United States v. Quillen*, 27 MJ 312 , 314 (CMA 1988), quoting *United States v. Swift*, 17 USCMA 227, 232, 38 CMR 25, 30 (1967).

Thus, the critical question is: Under all the circumstances of the case, did the civilian investigation by Detective Griggs and the military investigation by NIS Agent Cashman into the murder of the victim "merge[ ] into an indivisible entity"? I believe that it did. As the dissent in *Jordan I* recognized, "[T]he statement made on July 31 to Detective Griggs of the Chesapeake Police Department was the product of a lengthy joint investigation in which Griggs had been engaged with Special Agent Cashman of the Naval Investigative Service (NIS)." Indeed, as Cashman himself acknowledged, he and the Chesapeake police "were running a co-investigation, or an investigation in concert."

This is the state of the record: Cashman acknowledged that the NIS and the Chesapeake Police Department

pooled information. Consistently, Griggs agreed that he and Cashman worked "very closely." Early in the investigation, the two even traveled to Italy together to interview a number of military members. Their team effort at interviews continued on their return to the United States, where they together interviewed appellant several times over the course of their investigation. Indeed, a transcript of a 2-hour interview of appellant on May 3, 1985, which was admitted as an appellate exhibit at trial, removes any doubt that Griggs and Cashman—the civilian police and the NIS—performed as a team during this investigation.

Further indication of this is: The Chesapeake Police conducted a polygraph examination of a military witness at the Navy's request. *See generally United States v. Aau,* 12 USCMA 332, 338, 30 CMR 332, 338 (1961)(civilian police is "instrument" of the military if there is "a request by the military that [the civilian police] act for it").

Yet even more indication is: When appellant returned to the United States from Europe, Cashman and Griggs were awaiting him, together, at the airport. During the following 2 days, Cashman and Griggs, together, made two trips to the vicinity that appellant had identified as the murder scene. The rights' waivers that appellant exercised during this period of time were witnessed, again, by both Cashman and Griggs. On the morning when Griggs served the civilian arrest warrant on appellant at the Norfolk brig, Cashman was there. During the subsequent interview by Griggs at the Chesapeake Police Department interrogation room, Cashman was there. Tellingly, the transcript of appellant's July 31 statement itself is titled: "INTERVIEW OF SPENCER ISSAK JORDAN . . . BY: DETECTIVE C.S. GRIGGS, AND BRIAN CASHMAN, SPECIAL AGENT, NIS."

Even Judge Freyer in his separate opinion in the Court of Military Review found the efforts of these two law en-

forcement officers had "merged" but had become "unmerged at the point where the City of Chesapeake assumed full prosecutorial jurisdiction and custody over the appellant and his accomplice pursuant to civilian arrest warrants shortly before the critical 31 July 1985 statement was taken from the appellant by Officer Griggs." 35 MJ at 863. If so, then one might ask why Agent Cashman still was *present* at all subsequent interrogations. If, as the Government contends, Griggs merely permitted Cashman to be present, the question remains why *Cashman wanted* to be present if it was so clear at that point that the *military* involvement in this unified investigation was over.

Independent investigations, whether by Federal or local authorities, will not trigger Mil.R.Evid. 305(e). *See United States v. Lonetree,* 35 MJ 396 (CMA 1992). The same is true if the military agent merely is present or along for the ride. That is *not* true, though, where both the civilian and the military agents are actively investigating *together* at virtually every juncture. From the start, this was *one* investigation, and it continued as one, even at the point when Virginia authorities believed that they would assert jurisdiction (witness Agent Cashman continuing thereafter to be part of civilian interrogations). As such, I am satisfied that it was error for Griggs to interview appellant on July 31 without the presence of Lieutenant Stallings. Mil.R.Evid. 305(b)(1), (c), and (e); *United States v. McOmber,* 1MJ 380 (CMA 1976).

On the basis of this reasoning, I would hold that appellant's Fifth Amendment rights were not transgressed during this investigation but that his right to the presence of his military defense counsel at the July 31 interview under Mil.R.Evid. 305 was violated. Accordingly, I would reverse the decision and authorize a rehearing, *sans* the tainted evidence.

APPENDIX B

U.S. NAVY-MARINE CORPS
COURT OF MILITARY REVIEW

NMCM 86 1006R

UNITED STATES

v.

SPENCER I. JORDAN, 223 88 6944,
AIRMAN (E-3), U.S. NAVY

Sentence Adjudged 22 Oct. 1985
Decided 8 Sept. 1992

Capt. Dwight H. Sullivan, USMC, Appellate Defense Counsel.

LCDR Lawrence W. Muschamp, JAGC, USN, Appellate Government Counsel.

Before FREYER, HOLDER and MOLLISON, JJ.

MOLLISON, Judge:

On 3 February 1985, Electrician's Mate Second Class Gregory V. Swafford, U.S. Navy disappeared from his duty station. His body was later discovered in a tidal creek in Chesapeake, Virginia. On 31 July and 3 August 1985, the appellant confessed to civilian police that Petty Officer Swafford had been strangled and robbed by the appellant and another servicemember. The appellant was tried by

general court-martial in October of 1985. He was found guilty of conspiracy to commit robbery, robbery and murder while engaged in the perpetration of a robbery in violation of Articles 81, 122, and 118, Uniform Code of Military Justice [hereinafter UCMJ or "the Code"], 10 U.S.C. § 881, 922, 918, respectively, and was sentenced to confinement for life, a dishonorable discharge, total forfeitures, and reduction to pay grade E-1.

At trial and on appeal, the appellant asserted that his pretrial confessions to civilian police should be suppressed on grounds they had been taken contrary to the Constitution and Military Rule of Evidence (Mil.R.Evid.) 305(e).[1] Initially the appellant was placed in pretrial confinement in a Navy brig to await trial for Swafford's murder. Though military charges had not yet been preferred, a military lawyer was appointed to represent the appellant, and the appellant consulted with him on 31 July 1985. The same day, Navy officials delivered the appellant to the civilian authorities on a civilian arrest warrant for the same murder. The civilian police detective who executed the arrest warrant was aware of the appointment of military defense counsel. The same detective initiated the interrogation that resulted in a confession. The civilian police detective did not notify the appellant's military

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[1] The first confession was made to a detective of the Chesapeake, Virginia, Police Department. The second was made to a police sergeant from the Norfolk, Virginia, Police Department.

The appellant's arguments and briefs appeared to encompass both the Fifth and Sixth Amendments as bases for suppressing the statements on constitutional grounds. As noted below, this Court and the United States Court of Military Appeals previously entertained the appellant's appeal and ruled adversely to him. The case is now before us again on remand from the United States Supreme Court. On remand, the Sixth Amendment is not advanced as a basis for suppressing the confessions.

defense counsel of his intent to interrogate the appellant. A second interrogation was initiated three days later by a police sergeant of a different civilian jurisdiction. He apparently had no knowledge of the appointment of military defense counsel. The appellant again confessed. In light of the matters revealed in the second confession, the appellant was returned to the Navy and the aforementioned court-martial ensued.[2] The appellant claimed that the first confession was inadmissible because military defense counsel was not given notice of the interrogation and was not present for it. He also claimed the first confession tainted the second.

The Fifth Amendment to the Constitution provides that no person shall be compelled in any criminal case to be a witness against himself. In *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the United States Supreme Court held that in order to ensure an accused's Fifth Amendment right against compulsory self-incrimination is protected, an accused's pretrial statements made to police while in their custody would be inadmissible against the accused unless the statement was preceded by advice to the accused that he had the right to remain silent and the right to the presence of counsel, retained or appointed, and the accused voluntarily, knowingly and intelligently waived those rights. 384 U.S. at 444-45, 86

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[2] The case was processed under Supreme Court precedents on the issue of courts-martial jurisdiction existing prior to *Solorio v. United States*, 483 U.S. 435, 107 S.Ct. 2924, 97 L.Ed.2d 364 (1987). *Relford v. Commandant*, 401 U.S. 355, 91 S.Ct. 649, 28 L.Ed.2d 102 (1971); *O'Callahan v. Parker*, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969). The revelation in the appellant's final statement to the civilian policeman that the plot to rob Petty Officer Swafford was conceived aboard a military installation appears to have been the factor that induced Navy authorities to obtain the return of the appellant for trial by court-martial.

S.Ct. at 1612-13. In *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), the Supreme Court further held that when an accused has invoked his right to have counsel present during a custodial interrogation, the accused may not be subjected to further interrogation by the authorities until counsel is made available to him unless the accused himself initiates further communication, exchanges, or conversations with the police. It also held in *Edwards* that a waiver of the accused's previously-invoked right to the presence of counsel cannot be shown only by the fact that the accused responded to further police-initiated custodial interrogation, even if he has been readvised of his rights. 451 U.S. at 484-85, 101 S.Ct. at 1884-85. These same constitutional limitations on the admissibility of pretrial statements have been applied to trials by court-martial. *E.g., United States v. Goodson,* 22 M.J. 22 (C.M.A. 1986); *United States v. Tempia,* 16 C.M.A. 629, 37 C.M.R. 249 (1967); Mil.R.Evid. 304(a), (c). *See also United States v. King,* 30 M.J. 59 (C.M.A. 1990).

The President has promulgated the Military Rules of Evidence for use in trials by court-martial. Article 36, UCMJ; 10 U.S.C. § 836. Mil.R.Evid. 304 provides that an accused's involuntary statements are inadmissible. A statement is "involuntary" under the rule if it is obtained in violation of the self-incrimination privilege or due process clause of the Fifth Amendment, Article 31 of the Code, 10 U.S.C. § 831, or through the use of coercion, unlawful influence, or unlawful inducement. Mil.R.Evid. 304(c)(3). Mil.R.Evid. 305 also provides that an accused's pretrial statement is involuntary, and hence inadmissible, if it is obtained without first observing certain procedures. *Inter alia,* a servicemember accused or suspected of an offense must be warned of his right to consult with and have

present counsel, retained or appointed, prior to interrogation: (1) if the servicemember is in custody or is deprived of his freedom of action in any significant way, or (2) if the interrogation is conducted subsequent to preferral of charges or the imposition of pretrial restraint and the interrogation concerns the offenses or matters that were the subject of the preferral of charges or the imposition of pretrial restraint. Mil.R.Evid. 305(d). Additionally, counsel must be given notice of an intended interrogation and a reasonable opportunity to attend. Mil.R.Evid. 305(e). The requirements of Mil.R.Evid. 305 apply to persons subject to the Code, including persons acting as knowing agents of a military unit or of a person subject to the Code. Mil.R.Evid. 305(b)(1).

These two grounds for suppression—one based on the Constitution, the other on regulation—differ. The Fifth Amendment *Miranda/Edwards* constitutional requirements apply to military and civilian law enforcement authorities conducting an interrogation of an accused in custody. If the accused invokes his right to counsel, the interrogation must cease and may not again be initiated by such authorities in the absence of counsel. However, this rule "applies only when the suspect 'has expressed' his wish for the particular sort of lawyerly assistance that is the subject of *Miranda*. It requires, at a minimum, some statement that can reasonably be construed to be expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police." *McNeil v. Wisconsin*, ____ U.S. ____, ____, 111 S.Ct. 2204, 2208, 115 L.Ed.2d 158 (1991) (citation omitted). *See also Moran v. Burbine*, 475 U.S. 412, 423 n. 1, 106 S.Ct. 1135, 1141 n. 1, 89 L.Ed.2d 410 (1986). The assertion of counsel for these purposes must be within the context of custodial interrogation. *McNeil*, ____ U.S. at ____ n. 3, 111 S.Ct. at 2211 n. 3. On the other hand, Mil.R.Evid. 305 applies only to

military personnel, persons acting as their agents, or persons acting as agents of a military unit. It applies to custodial interrogations and to non-custodial interrogations occurring after charges have been preferred or the imposition of pretrial restraint. Mil.R.Evid. 305(e) obliges the interrogator to give notice of interrogation to counsel and afford the accused's retained or appointed counsel an opportunity to attend the interrogation, apparently whether or not the accused has ever invoked his right to counsel within the context of an interrogation.[3]

This Court and the United States Court of Military Appeals previously rejected appellant's assignment of error respecting the suppression of his confessions and affirmed the appellant's conviction.[4] *United States v. Jordan*, 29 M.J. 177 (C.M.A. 1989); No. 86-1006 slip op. (N.M.C.M.R. 30 June 1987). After the decisions of this Court and the Court of Military Appeals were handed down, the Supreme Court decided *Minnick v. Mississippi*, 498 U.S. 146, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990). In that case, the Supreme Court clarified *Edwards*, holding that "when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney." 498 U.S. at ____, 111 S.Ct. at 491. On 10 December 1990, the United States Supreme Court granted appellant's petition for certiorari, vacated the judgment, and remanded the case to the Court of Military Appeals "for further consideration in light of *Minnick*."

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[3] Mil.R.Evid. 305(e) is based on *United States v. McOmber*, 1 M.J. 380 (C.M.A. 1976). Mil.R.Evid. 305(e) Analysis. In *McOmber*, the accused invoked his right to counsel.

[4] Appellant was also convicted of unpremeditated murder. This Court dismissed that offense on grounds it was multiplicious with the offense of murder while engaged in the perpetration of a robbery.

498 U.S. at ____, 111 S.Ct. at 575. The Court of Military Appeals considered it appropriate that this Court should have the initial opportunity to review this case in light of *Minnick*, and therefore, it set aside our original decision and remanded the record to this Court for further review. 32 M.J. 376 (C.M.A. 1991) (summary disposition). It is on the basis of *Minnick*, which further interprets an accused's Fifth Amendment right against self-incrimination, that the appellant's case has been remanded for our further review.[5]

Neither the Supreme Court nor the Court of Military Appeals has remanded the case for further review of our rulings respecting the suppression of the confessions on the grounds they were taken by the civilian police contrary to the Military Rules of Evidence. Nonetheless, appellant again asserts on remand that the appellant's confessions to civilian authorities should have been suppressed because they were taken in contravention of appellant's Fifth Amendment right to counsel *and* Mil.R.Evid. 305(e). The appellant also has assigned three new supplemental errors unrelated to the admission of his confessions.[6] During oral

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[5] The facts of the appellant's case are otherwise comprehensively summarized in the Court of Military Appeal's affirmance and will not be restated herein except as necessary to the disposition of this remand.

[6] SUPPLEMENTAL ISSUE I. THE STAFF JUDGE ADVOCATE ERRED BY ADVISING THE CONVENING AUTHORITY THAT APPELLANT HAD BEEN CONVICTED OF A MURDER SPECIFICATION WHICH HAD BEEN DISMISSED.

SUPPLEMENTAL ISSUE II. APPELLANT'S COURT–MARTIAL LACKED JURISDICTION BECAUSE THE MILITARY JUDGE WAS DESIGNATED IN VIOLATION OF THE APPOINTMENTS CLAUSE OF THE CONSTITUTION.

SUPPLEMENTAL ISSUE III. THE COURT-MARTIAL HAD NO JURISDICTION BECAUSE THE MILITARY JUDGE'S

argument, appellant's counsel urged that a vacation of the judgment or setting aside of our previous decision entitled the appellant to re-submit all issues to this Court for consideration. We disagree.

Courts of Military Review must obey implicitly the mandates of the Court of Military Appeals. *United States v. Renfroe,* 3 M.J. 790 (A.C.M.R. 1977), *pet. denied,* 4 M.J. 12 (C.M.A. 1977), *pet. denied,* 4 M.J. 12 (C.M.A. 1977) (cited with approval in *United States v. Montesinos,* 28 M.J. 38 (C.M.A. 1989)). When a case is remanded to a Court of Military Review in limited terms, the Court of Military Review by clear implication must confine its review to matters within those limitations. The scope of review on remand will be interpreted closely. The scope of review on remand is determined on the basis of the qualifying terms of the remand order, and not based on the use of standard decretal terms, such as the "the judgment is vacated," "vacated and remanded," or "the decision is set aside." *Renfroe,* 3 M.J. at 793. "Except that which we are mandated to review, our previous rulings are the law of the case and will not now be reconsidered." *Id.* (quoting *Gradsky v. United States,* 376 F.2d 993 (5th Cir.), *cert. denied sub nom. Grene v. United States,* 389 U.S. 908, 88 S.Ct. 224, 19 L.Ed.2d 224 (1967)). *See also United States v. Lee,* 30 C.M.R. 684 (N.B.R. 1960); *United States v.*

LACK OF A FIXED TERM OF OFFICE LEFT THE MILITARY JUDGE INSUFFICIENTLY INDEPENDENT TO SATISFY THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE. *But see United States v. Graf,* 32 M.J. 809 (N.M.C.M.R. 1990), *petition granted,* 34 M.J. 169 (C.M.A. 1991). BECAUSE THE ERROR IS JURISDICTIONAL AND THE RECORD CONTAINS NO EVIDENCE OF A *KNOWING* WAIVER OF APPELLANT'S RIGHT TO AN INDEPENDENT MILITARY JUDGE, THE ISSUE IS NOT WAIVED EVEN THOUGH IT WAS NOT RAISED AT TRIAL.

Valenzuela, 22 C.M.R. 454 (A.B.R. 1956), *pet. denied*, 7 C.M.A. 794, 23 C.M.R. 421 (1956). In sum, a remand for a particular purpose does not entitle an appellant to litigate issues outside the purpose or scope of the remand.

The Supreme Court remanded appellant's case for further consideration in light of *Minnick*. The Court of Military Appeals considered "it appropriate, in the first instance, that the Court of Military Review should have the initial opportunity to review this case in light of *Minnick*." *United States v. Jordan*, 32 M.J. at 376. Accordingly, our charter is to review the appellant's Fifth Amendment challenge to the admissibility of his confessions in light of *Minnick*, not to review an independent challenge based upon other regulatory requirements unaffected by *Minnick* or to review wholly unrelated issues. *Cf. Johnson v. Board of Education of Chicago*, 457 U.S. 52, 102 S.Ct. 2223, 72 L.Ed.2d 668 (1982). Therefore, the previous decisions of this Court and the Court of Military Appeals as to the Mil.R.Evid. 305(e) challenge remain the law of the case.[7]

In any case, we are not inclined to disturb our previous decision in respect to the Mil.R.Evid. 305(e) challenge. The civilian police would have a duty to notify counsel of the intended interrogation under Mil.R.Evid. 305(e) only if they were acting as a knowing agent of a military unit

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[7] On 28 April 1992, we granted the appellant's motion to raise supplemental assignments of error. These assignments of error are unquestionably beyond the scope of the remand, and therefore we countermand our granting of that motion. In any case, these additional assignments of error are without merit. *Cf. United States v. Watkins*, 35 M.J. 709 (N.M.C.M.R. 1992); *United States v. Coffman*, 35 M.J. 591 (N.M.C.M.R. 1992) (per curiam); *United States v. Graf*, 32 M.J. 809 (N.M.C.M.R. 1990), *petition granted*, 34 M.J. 169 (C.M.A. 1991); *United States v. Lowry*, 33 M.J. 1035 (N.M.C.M.R. 1991).

or a person subject to the Code. Mil.R.Evid. 305(b)(1), (e). Mil.R.Evid. 305 applies to domestic non-military investigations on the basis of agency. Presence, participation, and cooperation of NIS are not themselves determinative. They are only factors to be considered in determining whether the civilian police were acting as agents of the military. Absent a subterfuge or an attempt at deliberate evasion of the rule, civilian interrogators are not agents of the military unless in some way they are under the direction or control of the military. *See United States v. Aau*, 12 C.M.A. 332, 30 C.M.R. 332 (1961) (civilian police were not agents of the military by virtue of an agreement to cooperate); *United States v. Holder*, 10 C.M.A. 448, 28 C.M.R. 14 (1959) (*cited with approval in United States v. Temperley*, 22 C.M.A. 383, 47 C.M.R. 325 (1973) (FBI agents were not agents of the military, even as to military offense, because the military exercised no control or direction over them)).[8]

There is no evidence of a subterfuge or an attempt to evade the rule. The civilian interrogators were not in some way under the direction or control of the military. Additionally, the record amply supports the conclusion that the civilian authorities were acting in furtherance of their own independent investigation and were not otherwise instruments of the military. Record at 50, 54, 60, 63, 64, 70-72, 75, 77, 80-81, 83-84, 94, 97, 99, 103, 116. *See United States v. Penn*, 18 C.M.A. 194, 39 C.M.R. 194 (1969) (independent investigation by secret service did not require Art. 31(b), UCMJ warnings); *United States v. Lonetree*, 31 M.J. 849 (N.M.C.M.R. 1990), *petition granted*, 32 M.J. 460 (C.M.A. 1991) (independent investigation by

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[8] We do not believe the *Holder/Aau*-direction/control test was abandoned for determining agency in *United States v. Penn*, 18 C.M.A. 194, 39 C.M.R. 194, 199 (1969).

U.S. Intelligence agents did not require Art. 31(b), UCMJ warnings). It is true an NIS agent was present at the first of the two civilian interrogations, and the caption on the transcript of the interview states the interview was by the civilian detective and the NIS agent. However, the civilian police took delivery of the appellant pursuant to their own arrest warrant and Article 14(a), UCMJ, 10 U.S.C. § 814(a). Record at 75-76. At the time the civilian police took delivery of the appellant, military charges had not been preferred against the appellant, and it appeared the civilian authorities had prosecutorial jurisdiction.[9] The interrogation was conducted by the civilian detective on his own turf. The NIS agent asked no questions, and the civilian detective expressly disclaimed conducting the interrogation on behalf of NIS. Record at 80-81. The NIS agent was not present for the second interrogation. In sum, we would conclude the civilian police were not acting as the agents of a military unit or of a person subject to the Code, and accordingly, Mil.R.Evid. 305 did not apply to them. The Fifth Amendment, *Miranda* and *Minnick* would, however, apply to them. We, therefore, pass then to the purpose of this remand—consideration of the impact of *Minnick* upon this case.

The appellant was appropriately advised of his *Miranda* rights, including his right to counsel prior to making the two disputed confessions. He executed a waiver of those rights. *Edwards* and *Minnick* apply to those situations wherein the accused has *invoked* his right to counsel. The record reflects and the parties on appeal all agree that the appellant at no time pertinent to these proceedings invoked before any interrogator, military or civilian, his right to counsel.[10] Record at 76, 92-94, 96, 99, 110-11,

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[9] *Supra* note 2.

[10] After appellant made a verbal confession on 3 August 1985, there was a colloquy between the appellant and the interrogator respecting

116, 118, 121; Appellate Exhibits XII, XIV, XVIII, XXI. We do not infer from the fact that military authorities appointed military counsel while appellant was in the brig prior to transfer to the civilian authorities that the appellant had invoked his right to counsel. *Cf. McNeil; Burbine.* The appellant in effect suggests we read *Edwards* or *Minnick* to say that when an accused purports to waive his right to counsel and does not otherwise signal to an interrogator that he intends to deal with the authorities only through his counsel, the authorities are obliged to assume the contrary, to canvass attorneys with whom the accused may have had contact, and to give them notice of the interrogation. We read *Edwards, Minnick,* and *McNeil* precisely to the contrary.[11] The constitutional requirements respecting the right to counsel announced in *Miranda* and *Edwards* are satisfied if the accused is informed of his rights under *Miranda,* voluntarily, knowingly and intelligently waives those rights, and does not otherwise, at a

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counsel. The interrogator attempted unsuccessfully to place the appellant in touch with an attorney named by the appellant. This appears to be the first time the appellant indicated in some way he was concerned about his representation. The colloquy was equivocal, and occurred after the appellant had made his tape-recorded admissions. The statement was thereafter transcribed and signed by the appellant. Record at 93, 96, 99. The Government relied on the verbal statements and did not offer the signed statement of the appellant. Record at 353-359.

[11] *See also Moran v. Burbine,* 475 U.S. 412, 106 S.Ct. 1135, 90 L.Ed.2d 410 (1986) (waiver of Fifth Amendment right to counsel unaffected by the fact police did not inform accused an attorney was endeavoring to reach him and attorney-client relationship alone does not trigger Sixth Amendment right to counsel); *United States v. McDonald,* 9 M.J. 81 (C.M.A. 1980) (Secret Service agent had no obligation to notify servicemember's appointed military counsel of intent to interrogate accused on altered treasury check charge which was unrelated to drug offenses for which military counsel had been appointed).

minimum, make within the context of custodial interrogation some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police or criminal investigators within the Armed Forces. Appellant made no such statement. Therefore, inasmuch as *Edwards* has no impact upon the appellant's case, neither does *Minnick*. If *Edwards* and *Minnick* are to be extended to require the police to give notice of an intended interrogation to any attorney with whom the accused may have consulted over a matter in the absence of an invocation by an accused of his right to counsel, such an extension is the province of a higher court. Accordingly, we conclude the appellant's assignment of error on remand is without merit, and we reaffirm our previous decision in his case.

Judge HOLDER concurs.*

FREYER, Senior Judge (concurring in part and concurring in the result):

I concur in all substantive aspects of Judge Mollison's opinion, but I do not concur in his restrictive interpretation of our mandate. This case was not sent back to us for a limited hearing while our initial affirmance was left intact; it was sent back for reconsideration after our previous decision was set aside. If, upon reconsideration, the current members of the panel entertained a reasonable doubt of the appellant's guilt or deemed the sentence inappropriate, should we, nevertheless, be compelled to affirm the findings and sentence, notwithstanding Article 66, 10 U.S.C. § 866, because to do otherwise would exceed our mandate? Similarly, I see no obstacle to our reconsidering any other non-*Minnick* issues, such as the application of

* Colonel Holder took final action on this case prior to his retirement.

Military Rule of Evidence 305. Not only does the mandate not expressly limit our reconsideration to *Minnick* issues, but it also does not do so by operation of law, *cf., United States v. Montesinos,* 28 M.J. 38 (C.M.A. 1989), since the previous affirmance of the U.S. Court of Military Appeals was, itself, set aside by the order of the U.S. Supreme Court. It seems to me that the only way we could violate the mandate would be by refusing to consider the case in light of *Minnick v. Mississippi.* Consequently, I believe that our order permitting supplemental assignments of error was well within ~~our~~ discretion under the mandate.

Having said that, I agree that the consultation between the appellant and his lawyer, Lieutenant Stallings, however that lawyer came to be assigned, was not pursuant to the appellant's expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police and, hence, was not an exercise of his *Miranda* rights. In addition, I believe that, although the investigations conducted by the Naval Investigative Service and the City of Chesapeake did merge during the trip to Gaeta, they un-merged at the point where the City of Chesapeake assumed full prosecutorial jurisdiction and custody over the appellant and his accomplice pursuant to civilian arrest warrants shortly before the critical 31 July 1985 statement was taken from the appellant by Officer Griggs. I concur in affirming the findings of guilty and the sentence.

APPENDIX C

Tuesday, February 12, 1991
91-90

APPEALS – SUMMARY DISPOSITIONS

No. 58976/NA. U.S. v. Spencer I. Jordan. CMR 86-1006. Upon remand of the above-entitled case by the Supreme Court of the United States to this Court for further consideration in light of *Minnick v. Mississippi*, 498 U.S. ____, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990), we have reexamined the decision of the United States Navy-Marine Corps Court of Military Review and our opinion in this case and consider it appropriate, in the first instance, that the Court of Military Review should have the initial opportunity to review this case in light of *Minnick*. Accordingly, it is ordered that the decision of the United States Navy-Marine Corps Court of Military Review, ____ U.S. ____, 111 S.Ct. 575, 112 L.Ed.2d 580, is set aside; and that the record of trial is returned to the Judge Advocate General of the Navy for remand to that court for further review. Thereafter, the record will be returned directly to this Court.

APPENDIX D

Friday, January 11, 1991
91-69

REMAND FROM SUPREME COURT OF THE UNITED STATES

No. 58976/NA. U.S. v. Spencer I. Jordan. CMR 86-1006. Notice is hereby given that the above-entitled case was returned to the Clerk's Office, in accordance with the order of the Supreme Court of the United States dated January 10, 1991, remanding the case to this Court for further consideration in light of *Minnick v. Mississippi*, 498 U.S. ____, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990), and has been referred to the Court for further consideration.

APPENDIX E

U.S. COURT OF MILITARY APPEALS

No. 58,976
NMCM 86 1006

UNITED STATES, APPELLEE

v.

SPENCER I. JORDAN, AIRMAN, U.S. NAVY, APPELLANT

Sept. 28, 1989

For Appellant: *Lieutenant John L. Staley, JAGC, USNR* (argued); *Lieutenant Commander Robert J. Smith, JAGC, USN* and *Lieutenant Deborah D. Sorkin, JAGC, USNR.*

For Appellee: *Lieutenant Commander L. Friedman, JAGC, USN* (argued); *Captain Wendell A. Kjos, JAGC, USN* (on brief).

OPINION

Cox, Judge:

Contrary to his pleas, appellant stands convicted of conspiracy to commit robbery, robbery, and murder while engaged in the perpetration of robbery, in violation of Articles 81, 122, and 118, Uniform Code of Military Justice, 10 USC §§ 881, 922, and 918, respectively.[1] His approved

[1] He was also convicted of unpremeditated murder, but the Court of Military Review dismissed that specification and otherwise affirmed the findings and sentence in an unpublished opinion dated June 30, 1987.

sentence is a dishonorable discharge, confinement for life, total forfeitures, and reduction to E-1. We granted review of this issue:

> WHETHER THE MILITARY JUDGE ERRED BY ADMITTING APPELLANT'S STATEMENTS, MADE WITHOUT COUNSEL PRESENT, TO A CIVILIAN DETECTIVE AND A NAVAL INVESTIGATIVE SERVICE AGENT WHO KNEW APPELLANT HAD BEEN DETAILED A MILITARY COUNSEL WITH WHOM HE ALREADY CONFERRED.

I

The deceased, Aviation Electrician's Mate Second Class Gregory V. Swafford, was one of appellant's roommates at the Naval Air Station, Norfolk, Virginia. According to appellant's multiple admissions, he and his friend, Operations Specialist Seaman Thomas E. Hardnett, Jr., prevailed upon Swafford to drive them into Norfolk on the evening of February 2, 1985. Before leaving the air station, Hardnett informed appellant of his intent to rob Swafford.

When Swafford dropped the pair off in Norfolk, Hardnett provoked an argument. Appellant restrained Swafford while Hardnett killed him; appellant removed his wallet. Together they loaded the deceased into the trunk of his car, drove to a nearby body of water (a tidal creek branching off the Elizabeth River) in Chesapeake, Virginia, and dumped the corpse in the creek. Ultimately, they returned to the air station, leaving the car in a parking lot there. When Swafford turned up missing the next day, their story was that they last saw him when he dropped them off in town the evening before. Due to the coldness of the water at that time of year, the body did not surface for several months.

The unfolding of the story of appellant's involvement spanned many months. Because Swafford was a "4.0 sailor" and because his car was located on base, the naval authorities did not believe he was an unauthorized absentee. Rather, "a worst-case scenario" was assumed from the outset. Along with dozens of other sailors, appellant was interviewed in an effort to find out anything possible about Swafford's disappearance. On February 8, 1985, appellant provided his initial statement to a Naval Investigative Service (NIS) special agent. Appellant clearly was not a suspect at this time; he was not advised of his rights; and he related the cover story agreed upon with Hardnett.

The intensity of the investigation increased dramatically after April 3, 1985, when Swafford's body was discovered having surfaced within the jurisdiction of Chesapeake, Virginia. A camera strap, later identified as Hardnett's, was still tightly tied around Swafford's neck. The pathologist who examined the body opined that the cause of death was strangulation. Up until the finding of the body, foul play had not been conclusively established. The discovery touched off another round of interviews, involving this time both naval investigators and those of the City of Chesapeake.

Because appellant and Hardnett had provided the last confirmed sighting of Swafford, they were reinterviewed with great particularity.[2] By this time, appellant and others of his unit were deployed in the Mediterranean; Hardnett remained in Norfolk and was interviewed before appellant.

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[2] The complete content of Hardnett's interviews are not of record, but parts of them were presumably revealed by investigators while questioning appellant and confronting him with inconsistencies between his and Hardnett's accounts.

Appellant was interviewed onboard the USS PUGET SOUND (AD-38) at Gaeta, Italy, on May 3, 1985. Two law-enforcement officers traveled from Virginia to Italy as part of the continuing investigation: Special Agent Brian A. Cashman, NIS, and Detective Colin S. Griggs, Chesapeake Police Department. Their trips were financed by their respective agencies. Due to the location of the deceased's body and the lack of an established military connection, it was assumed that Chesapeake had jurisdiction in the case. In addition to appellant, 26 or 27 other servicemembers were interviewed in and about Gaeta. Appellant's interview, however, was one of only three in Italy that was tape-recorded and transcribed.

The law-enforcement officers still did not regard appellant as a suspect, and they did not advise him of his rights. Nevertheless, since he was one of the last people to see the deceased alive, they pressed him hard for details. Under close questioning about collateral events on the night Swafford disappeared, appellant's account varied in several respects from the account most recently given by Hardnett.[3] The investigators told appellant flatly that his account "differ[ed] significantly" from Hardnett's in several respects. After one such discrepancy, Special Agent Cashman went so far as to inquire of appellant: "O.k., do you know what making a false official statement means?"

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[3] Appellant maintained that the chronology detailed by Hardnett, concerning which particular bars they patronized after Swafford dropped them off and which particular women they encountered, had actually occurred on a different night from the night Swafford disappeared. According to appellant, he and Hardnett had visited that same vicinity on several occasions during the general time period. Appellant's recollection, therefore, as to their itinerary after they had last seen Swafford alive was somewhat different from Hardnett's.

Despite the officers' stated belief that appellant was not yet a suspect, the military judge concluded that

> one need only to read the transcript of the 3 May statement by the accused to know that if the NIS Agent did not subjectively suspect the accused of being involved in Swafford's death, he should have been by any objective standard[.]

Therefore, the judge suppressed appellant's May 3 statement. However, he observed that appellant's statement was not apparently incriminating, but merely differed in collateral detail from Hardnett's. Indeed, appellant clung tenaciously to the basic story that he and Hardnett had concocted, *i.e.*, the last time they saw Swafford was when he dropped them off in town. Therefore, since "the cat was not let out of the bag," the judge ruled that the officers' failure to advise appellant of his rights and to secure appropriate waivers on May 3 did not affect any of appellant's subsequent admissions. Moreover, the judge concluded that even if the May 3 statement contained incriminating admissions, the rights advisements given prior to the subsequent statements and the voluntary waivers of these rights by appellant were sufficient to purge any possible taint. *See* n.5, *infra*. Appellant was not arrested or in any way restricted following the May 3 interview.

In the opinion of the law-enforcement community, appellant and Hardnett became suspects as of June 12, 1985, when Hardnett, still in the States, failed three successive polygraph examinations.[4] From this point onward, all

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[4] This information was revealed during an Article 39(a), Uniform Code of Military Justice, 10 USC § 839(a), session in conjunction with several pretrial motions made by appellant. It was not received in evidence on the merits or otherwise communicated to the court members.

statements provided by appellant to law-enforcement agents, military or civilian, were preceded by appropriate rights warnings and waivers.[5]

After appellant was classified as a suspect by the law-enforcement community, the next official to contact him was NIS Special Agent Ronald J. Possanza, who was based in Sicily. Possanza caught up with appellant on July 22, 1985, aboard the USS KIDD (DDG-993), in the port of Haifa, Israel. Appellant consented to a search of his lockers.[6] There Possanza found two handwritten letters from Hardnett, sent to appellant through an intermediary.

In one of the seized letters, Hardnett advised appellant that he (Hardnett) had "fucked up" in his last conversation with the investigators by embellishing some of the collateral details about the evening in question. This letter appears to explain the inconsistencies between appellant's May 3 statement and Hardnett's last statement. It went on to instruct appellant how to tailor his story to dovetail with Hardnett's. It also cautioned appellant "to swear that you didn't talk to me or get a letter from me telling you anything that went on with Greg [Swafford] since you've been on this cruise!" And it ended with this fateful admonition, "[B]urn this letter as soon as you read it." Unfortunately for appellant, he failed to heed this last piece of advice.

The seizure of this letter apparently broke the case wide open. Armed with this glaring item of refutation, Possanza confronted appellant the next day, July 23, after first advising him of his rights and securing waivers thereof.

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[5] Though there is no issue before us concerning the correctness of the military judge's conclusions, they are well-founded in both fact and law. *See Oregon v. Elstad,* 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985).

[6] The validity of this consent is not before us.

Only the day before, appellant had still denied all knowledge of Swafford's disappearance. On the 23d, however, he began to back-pedal.

He now claimed that, several hours after Swafford dropped Hardnett and him off in town, Swafford reappeared and agreed to drive them back to base. On the way back, according to this account, Swafford made homosexual advances toward Hardnett and a "fuss" ensued. Swafford pulled the car off the road near a river, and they all got out. A fight developed between Hardnett and Swafford, which resulted in Swafford's death. Though appellant was "very drunk," he tried unsuccessfully to break up the fight, according to this version. Hardnett alone dragged the body into the water. Appellant never touched Swafford, did not take his wallet, and did not see Hardnett take it.

After the July 23 statement, arrangements were immediately made to transport appellant back to the States. He arrived in Norfolk late in the evening of July 26, 1985, accompanied by Special Agent Possanza. He was met in Norfolk by Special Agent Cashman and Detective Griggs, among others. He was again advised of his rights, which he waived. Agreeing to show the officers where the events had transpired, appellant rode in Detective Griggs' vehicle and directed the officers through his route on the night of February 2-3. Ultimately, he led them to a spot next to the same tidal creek where the body was recovered. He identified the location as the site where Hardnett killed Swafford. That night appellant was billeted in officers' quarters.

The next day, July 27, the group returned to the site, and appellant confirmed his identification in the daylight. That afternoon, at the NIS office, appellant made another sworn statement after again being advised of and waiving his rights. He once more recounted Hartnett's [*sic*] killing of

Swafford and his own futile attempt to break up the fight. This time, however, he admitted having put his hand on Swafford's chest after the fight, detecting no heart beat, and pronouncing him dead. Then, under compulsion from Hardnett, he helped drag the body into the water.

On July 28, appellant revised his story once again in a sworn statement transcribed by NIS agents. This time he indicated that, as he was trying to break up the fight, Hardnett "jumped" him from behind and drove him onto Swafford in such a way that appellant's

> forearm landed across Greg's throat and neck area, specifically across Greg's Adams apple, because I could feel his Adams apple on my forearm. There was a lot of pressure on Greg's throat and Adams apple from Thomas [Hardnett] being on top of me, because the next day, my right forearm was sore and [there was] a little swelling on the forearm where it laid across Greg's Adams apple. Thomas was pushing on top of me so hard that my face and mouth were pushed into Greg's right bicep. Thomas was on tope of me and my forearm was across Greg's throat for about 15 or 30 seconds. Thomas at this time was yelling, "Kill the son of a bitch!"

After appellant managed to extricate himself from the fracas, according to the statement, Hardnett proceeded "to strangle" Swafford "with his bare hands." Appellant temporarily succeeded in pushing Hardnett off Swafford, but Hardnett returned with his camera strap and tied it tightly around Swafford's neck. In the statement, appellant reiterated that the fight was between Hardnett and Swafford over the alleged homosexual overtures and that appellant's involvement was entirely inadvertent and innocent. Though appellant "felt . . . [his] arm on Greg's neck

may have been the crucial or critical injury causing Greg's death," it was only so because he "was unable to get . . . [his] arm free from Greg's neck." Appellant also explained in the statement that he had previously withheld this information due to its obvious potential for misinterpretation with respect to his culpability.

On July 28, appellant was ordered into pretrial confinement by military authorities. In the afternoon of July 30, Lieutenant Stephen A. Stallings, JAGC, USN, received notification that he had been appointed appellant's defense counsel. He met with appellant in the brig the next morning, July 31, for approximately 2 hours. He had already been informed that the civilian authorities might be taking jurisdiction in the case.

While Lieutenant Stallings was talking with appellant, Detective Griggs arrived at the brig with a Chesapeake warrant for appellant's arrest. After Stallings departed—he was unaware of Griggs' presence at the brig—the military authorities released appellant into Griggs' custody. Griggs knew appellant had a military attorney, but believed "that his military attorney had no authority off the military base once . . . [Griggs] served those papers on" appellant. Military charges were not, at that time, preferred against appellant.

The same day, July 31, Griggs took appellant to Chesapeake police headquarters, where he advised him of his rights to remain silent and to counsel under *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and the Fifth Amendment to the United States Constitution. Appellant waived his rights and agreed to talk to Griggs without counsel present. Neither Griggs nor appellant mentioned Lieutenant Stallings.

Thereafter, Griggs interrogated appellant in a tape-recorded interview; the content of the interview was tran-

scribed, and appellant swore under oath that it was a true statement. In this statement, appellant made the following admissions: The incident occurred at the time appellant and Hardnett were *first* dropped off *in Norfolk* (rather than much later *in Chesapeake* after a bout of drinking). The motive for the killing was plain robbery (the homosexual-advance claim was never hereafter repeated). Hardnett began to hassle Swafford in the car about money, and the argument ensued. When appellant and Hardnett got out of the car, Hardnett called Swafford out to discuss "financial problem[s]." The fight developed when Swafford declined to donate. As Hardnett was attempting to apply the fatal tourniquet to Swafford's neck, he instructed appellant to "grab his hands, grab his hands, . . . because Gregg was fighting back and hard and stuff." Appellant dutifully complied, while Hardnett

> pulled hard or yanked as far as you can feel something popping there, and Gregg just went down like, like a, like his life just went out of his body and he was holding Gregg up like this by this thing.

Again upon command, according to the statement, appellant removed Swafford's wallet and gave it to Hardnett. Appellant then assisted in putting the body in the trunk and rode along, with Hardnett driving, to the Chesapeake site near the water. There, appellant helped carry the body into the water. Then the two returned to the bars of Norfolk, where they encountered a prostitute, whose services they shared. According to appellant, he refused to accept any of Swafford's money and paid his share with his own money. Afterward, they returned to the air station in Swafford's car.

After making the July 31 statement, appellant led the officers to the alleyway in Norfolk where the killing had

taken place. Presumably, appellant was arraigned the next day, August 1, in Chesapeake.[7]

Appellant's mention that the killing took place in Norfolk changed the complexion of the case. The Virginia prosecutorial authorities agreed that, under Virginia law, the situs of a murder takes precedence over the place where the body is found, for purposes of jurisdiction. Therefore, on August 2, after being apprised of the facts then known, officials from the City of Norfolk decided that Norfolk was the appropriate entity to take jurisdiction in the case.

On August 3, law-enforcement officers from Norfolk assumed custody of appellant and immediately set about to question him. After again being advised of his rights and waiving them, appellant described the events substantially as before. For the first time, however, he admitted that, at the barracks before Swafford drove them into town, Hardnett had revealed his intent to "shake" Swafford, which appellant understood as meaning "to rob him." After making this additional concession, appellant led the Norfolk officers to the scene of the crime and reenacted what had taken place.

Upon returning to the police station, still on August 3, appellant repeated his last statement. This time the statement was tape-recorded and transcribed. While it was being typed up, appellant made the comment to the officers

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[7] The only indication that appellant may have been arraigned in Chesapeake was Detective Griggs' surmise to that effect. Though Griggs was not present at any arraignment of appellant and did not know whether one had actually occurred, he assumed that, in the ordinary course of events, appellant would have been arraigned before a City of Chesapeake General District Court Judge on or about August 1 and asked whether he needed a court-appointed attorney. To the best of Griggs' knowledge, no attorney was appointed for appellant by the Chesapeake court.

that he "wonder[ed] if the lawyer is going to handle my case." Asked which lawyer, appellant identified a civilian lawyer, Peter Decker, whereupon the officers promptly assisted appellant in looking up and dialing Decker's telephone number. However, appellant "got a recording." Asked what he wanted to do then, appellant replied, "I guess I'll have to wait until Monday and try him at the office." Appellant never requested to have a lawyer present at the interview and never mentioned Lieutenant Stallings' name. When the transcription was completed, appellant signed it.

With respect to this series of admissions, the military judge ruled:

> With regard to the 3 August statement to the Norfolk Police:
>
> The accused was properly advised of his Fifth Amendment and *Miranda* rights;
>
> He waived those rights and made a statement, Appellate Exhibit 15;
>
> His statement, "I wonder if an attorney is going to handle my case," was merely an expression of interest in future proceedings, and not a request for an attorney within the scope of *Miranda*;
>
> Assuming, however, it did constitute a request for counsel, it would not affect the statement he had already provided, but would impact only on the signature which he affixed to that statement.
>
> In conclusion, . . . [t]he motion to suppress the statement[ ] of . . . 3 August is denied.

Rather than redacting the signatures from the transcribed document and introducing the document itself into evidence on the merits, however, trial counsel elected to have the Norfolk police officer who had obtained the

statement, Sergeant Hazelette, testify as to appellant's oral admissions prior to his inquiry about the attorney. Appellant was arraigned before a Norfolk General District Court Judge on August 7, 1985, and a civilian lawyer, Mr. Carlson, was appointed to represent him on August 9.[8]

Appellant's mention that the conversation regarding the robbery had occurred on the air station and had preceded the trip to town again changed the complexion of the case. Until that point, naval authorities were unsure whether the events had enough of a military connection to sustain military jurisdiction over the offenses. The new evidence of the on-station conversation convinced the naval authorities that their jurisdiction would be sustained. Therefore, on August 9, 1985, they formally requested the City of Norfolk to release appellant to their custody for purposes of court-martial.

Although there was no doubt that the Commonwealth of Virginia had jurisdiction to try appellant, the Commonwealth's Attorney for Norfolk agreed that the Navy had the "greater prosecutorial interest . . . and more of a factual connection with the case than" did the Commonwealth, especially given that appellant, the victim, and the majority of the witnesses were military. Therefore, the Commonwealth moved, on August 12, 1985, "to nol pros the charges against" appellant in the Norfolk General District Court; the motion was granted.

Appellant was restored to military custody the same day, August 12, and was seen again by his military attorney on that day or the next. At the court-martial, Lieutenant Stallings served as detailed defense counsel, Lieutenant Timothy P. Sceviour served as assistant de-

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[8] The Norfolk arraignment and the appointment of Mr. Carlson are of no consequence to this appeal, since the last of appellant's statements received in evidence was that of August 3.

fense counsel, and a civilian attorney, Mr. Michael F. Fasanaro, Jr., served as lead defense counsel.

II

Appellant's contention, in essence, is that he was unfairly prejudiced by the erroneous receipt in evidence of his admissions on July 31 to Detective Griggs and on August 3 to Sgt. Hazelette. The basis for this claim is the formation of the attorney-client relationship between Lieutenant Stallings and appellant, which preceded these two statements. In appellant's view, these statements constituted violations of his Sixth Amendment right to counsel and the notice requirements of Mil.R.Evid. 305(e), Manual for Courts-Martial, United States, 1984.[9]

Before addressing these issues, it is necessary to review the status of subject-matter jurisdiction as it appeared to

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[9] Mil.R.Evid. 305(c), Manual for Courts-Martial, United States, 1984, provides:

> A person subject to the code who is required to give warnings under Article 31 may not interrogate or request any statement from an accused or a person suspected of an offense without first:
>
> (1) informing the accused or suspect of the nature of the accusation;
>
> (2) advising the accused or suspect that the accused or suspect has the right to remain silent; and
>
> (3) advising the accused or suspect that any statement made may be used as evidence against the accused or suspect in a trial by court-martial.

The August 3 statement is claimed to be "fruit of the poisonous tree," *i.e.*, the tainted July 31 statement. As a variation on this theme, appellant also contends that use of these statements was "fundamentally unfair" and that we should exercise our "supervisory powers" to find error in their receipt in evidence. Because we find these statements to have been properly admitted, we decline to exercise "supervisory powers" to exclude them.

be in July-August, 1985. In *O'Callahan v. Parker,* 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969), the Supreme Court, departing from long-established precedent, announced that only "service-connected" offenses could thereafter be tried by courts-martial.[10] This opinion was followed by *Relford v. Commandant,* 401 U.S. 355, 91 S.Ct. 649, 28 L.Ed.2d 102 (1971), which enumerated multiple factors having to be balanced on a case-by-case basis to determine whether an offense was service-connected. These opinions and those of the military appellate courts applying them cast into considerable doubt the jurisdictional status of many offenses committed off military installations. *E.g., United States v. Klink,* 5 M.J. 404 (C.M.A. 1978) (drug transaction between servicemembers occurring 30-feet off-post lacked service-connection); *United States v. Sims,* 2 M.J. 109 (C.M.A. 1977) (no service-connection in off-post forgery of money orders, where accused purchased money orders from fellow soldier, knowing they were stolen on-base from another soldier, and where accused forged the money orders and cashed them off-post, using his military identification card).

Admittedly, many of these earlier military opinions were substantially eroded by subsequent opinions. *E.g., United States v. Lockwood,* 15 M.J. 1 (C.M.A. 1983); *United States v. Trottier,* 9 M.J. 337 (C.M.A. 1980). Nonetheless, genuine doubt as to jurisdiction could still exist in a given set of facts. *United States v. Abell,* 23 M.J. 99, 103 (C.M.A.) ("accused's status as a servicemember is not sufficient in and of itself to confer jurisdiction over all his offenses no matter where and when committed"), *cert.*

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[10] *See* Droddy, *King Richard to Solorio: The Historical and Constitutional Bases for Court-Martial Jurisdiction in Criminal Cases,* 30 A.F.L. Rev. 91 (1989).

denied, 483 U.S. 1020, 107 S.Ct. 3263, 97 L.Ed.2d 762 (1987). One factor which often persuaded courts that service-connection existed was commencement of the offense on-post, even though it was consummated off-post. *E.g., United States v. Strangstalien,* 7 M.J. 225 (C.M.A. 1979) (on-post agreement to transfer drugs off-post).

On June 25, 1987, the Supreme Court published its decision in *Solorio v. United States,* 483 U.S. 435, 107 S.Ct. 2924, 97 L.Ed.2d 364. That opinion overruled *O'Callahan* and its progeny, and it abolished the jurisdictional doctrine of service-connection.[11] Instead, the Supreme Court held that court-martial subject-matter jurisdiction depended solely on whether the accused "was a member of the armed services at the time of the offense charged." 483 U.S. at 451, 107 S.Ct. at 2933 (footnote omitted). After *Solorio* was announced, we applied it to cases arising prior to that decision, either on the grounds of retroactivity, *see Griffith v. Kentucky,* 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), or because *Solorio* was simply a correct interpretation of always-existing jurisdiction. *United States v. Avila,* 27 M.J. 62, 65-66 (C.M.A. 1988).

Appellant's case evolved during the pre-*Solorio* era. This accounts for what might otherwise appear to be a game of legal hot potato being played by the military and civilian authorities.[12]

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[11] Though court-martial jurisdiction over the offense is not an issue on this appeal, there appears to be no doubt of such jurisdiction under either *O'Callahan/Relford* or *Solorio.*

[12] Any implication that the military authorities were merely playing games with appellant to circumvent his military right to counsel must be dealt with succinctly. Much of the background information available in the record of trial is attributable to appellant's own motion to dismiss the military charges on the ground that the offenses lacked service-connection and that the civilian interest was paramount. Indeed, the Commonwealth Attorney for the City of Norfolk (a distinguished judge advocate now retired) was called as a witness by the defense in an apparent attempt to establish this very point.

Turning to appellant's counsel rights, Article 27(a)(1), UCMJ, 10 USC § 827(a)(1), establishes the requirement that "[t]rial counsel and defense counsel shall be detailed for each general and special court-martial." Mil.R.Evid. 305(e) adds:

> When *a person subject to the code* who is required to give warnings under subdivision (c)[13] intends to question an accused or person suspected of an offense and knows or reasonably should know that counsel either has been appointed for or retained by the accused or suspect with respect to that offense, the counsel must be notified of the intended interrogation and given a reasonable time in which to attend before the interrogation may proceed.

(Emphasis added.) A "person subject to the code" is further defined as "includ[ing] a person acting as a knowing agent of a military unit or of a person subject to the code." Mil.R.Evid. 305(b)(1).

The logic of appellant's argument proceeds as follows: The military and civilian investigations had become so enmeshed that each side was "acting as a knowing agent of" the other. Mil.R.Evid. 305(b)(1). Hence, the civilian police officers were "person[s] subject to the code." Mil.R.Evid. 305(e). As Lieutenant Stallings had already been "appointed for . . . the accused . . . with respect to that offense," he should have been "notified of the intended [civilian] interrogation and given a reasonable time in which to attend." *Id.*

This analysis breaks down for two reasons. First, it is quite obvious that, in enacting Article 27, Congress was interested in providing servicemembers with competent

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[13] *See* n.9, *supra.*

and free legal representation in courts-martial. There is not the slightest trace of a suggestion in the extensive legislative history of this article that Congress intended thereby to inject military counsel into state criminal matters. Attachment of a right to military counsel for military proceedings neither enlarges nor decreases a servicemember's right to counsel in civilian proceedings. Unless military counsel are authorized to practice in state courts by state authorities and are given leave from their military duties, they simply have no role in state criminal matters. Neither of these conditions applied here; once the civilians asserted jurisdiction, military counsel's role ended.

Second, the civilian police were not acting as agents of military authorities. Clearly, they were not directly subject to the Uniform Code of Military Justice, and appellant does not so contend. With respect to his argument that, by virtue of the close working relationship between the various law-enforcement agencies, the civilian and military investigations had become so enmeshed that they "merged into an indivisible entity," both the military judge and the Court of Military Review found the contrary to be true as a matter of fact. These courts concluded that the investigators, while closely coordinating their activities and often working together, were at all times exclusively representing their respective sovereigns, and neither side became the agent of the other.

I also have reviewed this record carefully, and I fully agree with these conclusions. *Cf. United States v. Morrison,* 12 M.J. 272 (C.M.A. 1982); *United States v. Ravine,* 11 M.J. 325 (C.M.A. 1981). Accordingly, in my view, neither Article 27(a)(1) nor Mil.R.Evid. 305(e) obligated the civilian investigators to notify appellant's military counsel, and neither provision acts as a bar to receipt in evidence of appellant's statements to the civilians.

Next, I consider appellant's contention that his Sixth Amendment right to counsel was violated by the custodial interrogations conducted by Chesapeake and Norfolk authorities on July 31 and August 3, 1985. The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." The Supreme Court has interpreted this to mean "that the right to counsel does not attach until the initiation of adversary judicial proceedings." *United States v. Gouveia,* 467 U.S. 180, 188, 104 S.Ct. 2292, 2297, 81 L.Ed.2d 146 (1984); *see also Brewer v. Williams,* 430 U.S. 387, 398-99, 97 S.Ct. 1232, 1239-40, 51 L.Ed.2d 424 (1977); *Kirby v. Illinois,* 406 U.S. 682, 688-89, 92 S.Ct. 1877, 1881-82, 32 L.Ed.2d 411 (1972) (plurality opinion).

Adversary judicial proceedings commence for an accused

> at or after the time that judicial proceedings have been initiated against him—"whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."

Brewer v. Williams, supra 430 U.S. at 398, 97 S.Ct. at 1239, quoting *Kirby v. Illinois, supra,* 406 U.S. at 689, 92 S.Ct. at 1882. Attachment of the Sixth Amendment right

> guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a "medium" between him and the State.

Maine v. Moulton, 474 U.S. 159, 176, 106 S.Ct. 477, 487, 88 L.Ed.2d 481 (1985). *See also Brewer v. Williams, supra,* 430 U.S. at 399, 97 S.Ct. at 1240; *Massiah v. United States,* 377 U.S. 201, 205-07, 84 S.Ct. 1199, 1202-04, 12 L.Ed.2d 246 (1964).

Appellant's contention is that adversary judicial proceedings had already commenced in the military, prior to July 31, 1985, when the civilian authorities assumed control of him; and hence his Sixth Amendment rights had attached. The result, in appellant's view, is that the civilian authorities were obligated to deal with him through the "medium" of counsel. As Lieutenant Stallings was the only counsel appellant arguably had at the time, any admissions made by him in the absence of Lieutenant Stallings were barred by the Sixth Amendment.[14]

In my view, this analysis fails for several reasons. First, as already indicated, appellant's relationship with Lieutenant Stallings was limited to military proceedings. *Vis-a-vis* the civilian charges, Lieutenant Stallings had no official role. Second, the mere formation of an attorney-client relationship does not trigger a Sixth Amendment right to the presence of counsel. *Moran v. Burbine,* 475 U.S. 412, 428-32, 106 S.Ct. 1135, 1145-47, 89 L.Ed.2d 410 (1986). Third, pretrial confinement[15] does not initiate

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[14] Appellant does not contend, and he did not do so at trial, that his statement on August 3 to Sgt. Hazelette of the Norfolk police was barred by virtue of an arraignment on or about August 2 in Chesapeake. *See Michigan v. Jackson,* 475 U.S. 625, 629, 106 S.Ct. 1404, 1407, 89 L.Ed.2d 631 (1986), citing *United States v. Gouveia,* 467 U.S. 180, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984); *see also Brewer v. Williams,* 430 U.S. 387, 398, 97 S.Ct. 1232, 1239, 51 L.Ed.2d 424 (1977); *Kirby v. Illinois,* 406 U.S. 682, 689, 92 S.Ct. 1877, 1882, 32 L.Ed.2d 411 (1972) (plurality opinion). His failure to object at trial, in any event, constitutes waiver of such a claim. Mil.R.Evid. 103(a). Indeed, it is not even clear (*see* n.6, *supra*) that such an arraignment occurred, much less that appointment of counsel was requested.

[15] It is unclear whether appellant's brief military confinement from July 28-31, pending release to civil authorities, was properly classified as "pretrial restraint," under the provisions of RCM 304(a), Manual, *supra,* or "pretrial confinement," under RCM 305. However, for purposes of this appeal, it makes no difference what his status was.

adversary judicial proceedings or otherwise trigger the Sixth Amendment right to counsel. *United States v. Gouveia, supra,* 467 U.S. at 189-91, 104 S.Ct. at 2298-99.

We have previously held that, in the military, preferral of charges initiates adversary judicial proceedings and causes the Sixth Amendment right to counsel to attach. *United States v. Wattenbarger,* 21 M.J. 41 (C.M.A. 1985), *cert. denied,* 477 U.S. 904, 106 S.Ct. 3272, 91 L.Ed.2d 563 (1986). However, charges were not preferred in this case until August 21, 1985, some 9 days after appellant was returned to military control by Norfolk authorities and long after the events in question.

In the military, however, an accused placed in pretrial confinement has the right to "[a] review of the adequacy of probable cause to believe the prisoner has committed an offense and of the necessity for continued pretrial confinement . . . within 7 days of the imposition of confinement." RCM 305(i)(1), Manual, *supra.* If the prisoner requests it, "military counsel shall be provided to the prisoner before the initial review under subsection [305](i)." Such counsel is "assigned for the limited purpose of representing the accused only during the pretrial confinement proceedings before charges are referred." RCM 305(f).

We have never held that a review of the propriety of pretrial confinement constitutes commencement of adversary judicial proceedings for Sixth Amendment purposes. It is unlikely that we will ever confront such a question since counsel is automatically provided an accused upon request. However, even if—for the sake of argument—such a proceeding did trigger a Sixth Amendment right to counsel, it would be of no moment to this case since no such proceeding or hearing occurred in this case prior to appellant's release to Chesapeake authorities. Thus, notwithstanding appellant's condition as a pretrial restrainee or confinee, and notwithstanding the appointment of mili-

tary counsel, adversary judicial proceedings had not commenced in the military against appellant prior to his release to civilian authorities. Therefore, in my view, the civilian law enforcement officers had no Sixth Amendment duty to notify counsel and did not violate appellant's rights under that provision by questioning him in the absence of counsel.

Lastly, I consider the contention, first raised by the dissenting opinion herein and not advanced by appellant, that all admissions made by appellant after Lieutenant Stallings contacted him in the brig were barred by the Fifth Amendment.[16]

It is now well-settled that, under the Fifth Amendment, "an accused . . . *having expressed his desire to deal with the police only through counsel,* is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona,* 451 U.S. 477, 484-85, 101 S.Ct. 1880, 1884-85, 68 L.Ed.2d 378 (1981) (emphasis added); *see also Oregon v. Bradshaw,* 462 U.S. 1039, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983); *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

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[16] The Fifth Amendment to the Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself. . . ." Of course the Fifth Amendment contains no express right to counsel or to consult with counsel. That requirement was established in *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), "to insure that the right against compulsory self-incrimination was protected." *Michigan v. Tucker,* 417 U.S. 433, 444, 94 S.Ct. 2357, 2364, 41 L.Ed.2d 182 (1974). Appellant does not claim ever to have asserted a right to counsel under the Fifth Amendment or *United States v. Tempia,* 16 USCMA 629, 37 CMR 249 (1967), while being questioned.

As the Supreme Court later explained:

> The rule of the *Edwards* case came as a corollary to *Miranda*'s admonition that "*[i]f the individual states that he wants an attorney, the interrogation must cease* until an attorney is present." 384 U.S. at 474, 86 S.Ct. at 1627-1628.

Arizona v. Roberson, 486 U.S. 675, 108 S.Ct. 2093, 2097, 100 L.Ed.2d 704 (1988) (emphasis added). *See also Fare v. Michael C.*, 442 U.S. 707, 718, 99 S.Ct. 2560, 2568, 61 L.Ed.2d 197 (1979) ("interrogation must cease upon the accused's request for an attorney").

Roberson extends or clarifies *Edwards* in two respects: First, the opinion makes clear that police may not reinitiate contact with a "suspect, having requested counsel," even concerning an unrelated offense.[17] 108 S.Ct. at 2101. As appellant was never contacted by any investigators about any offense other than Swafford's murder, this aspect of *Roberson* adds nothing to *Edwards* with respect to this case. Second, it is clear after *Roberson* that it does not matter "that the officer who conducted the second interrogation did not know that . . . [the accused] had made a request for counsel." Rather, law enforcement officials must establish procedures which will "enable an officer who proposes to initiate an interrogation to determine whether the suspect has previously requested counsel." *Id.* 108 S.Ct. at 2101. This was the law in the military prior to *Roberson*. *United States v. Goodson*, 22 M.J. 22 (C.M.A. 1986). In any event, there is no issue in this case about the failure of an investigator to determine whether appellant had requested counsel. Thus, *Roberson* adds nothing to *Edwards* as applied to the facts of this case.

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[17] Law-enforcement officials are permitted, however, "to inform the suspect of the facts of the second investigation as long as such communication does not constitute interrogation. . . ." 108 S.Ct. at 2101.

Chief Judge Everett makes an eloquent argument, equating "a request for counsel" under RCM 305(f) with an exercise of rights under *Edwards v. Arizona, supra,* 29 M.J. at 191—with the result that civilian investigators would be barred from questioning appellant unless he initiated the conversation. The problem is the Chief Judge is the only one who has ever made this assertion. Appellant never claimed to have invoked a right to counsel: Trial defense counsel did not claim he did; and even appellate defense counsel have not so contended. Until now, no one has suggested that appellant ever sought to convey to anyone a desire to communicate with the police only through the medium of counsel. This case was litigated on a constitutional level as a Sixth Amendment matter all along, not as a Fifth Amendment one. Never was it alleged that the authorities failed to scrupulously honor appellant's wishes with respect to counsel.

As I read the Supreme Court's decisions, the Fifth Amendment exclusionary rule is triggered when an accused who has been advised of his rights *communicates* to law-enforcement personnel that he is unwilling to talk to them except through the medium of counsel. Ordinarily—but not necessarily—this occurs during an attempted interrogation. *See United States v. Goodson, supra.* The mere fact, however, that appointed military counsel went to the brig and discussed some aspects of the case with appellant is not, in my opinion, an invocation of the Fifth Amendment right to counsel. *Cf. Moran v. Burbine, supra.* My view does not turn on whether the accused asked to see a lawyer or the lawyer was merely assigned as a matter of course.

There may be many reasons why an accused wishes to consult with counsel, either about the case itself or about collateral matters, without necessarily manifesting a desire

not to discuss the case with law enforcement officials.[18] Again, there is simply no indication in this record that appellant, despite his obvious awareness of his rights, ever declined to discuss the case without counsel. Indeed, as far as this record discloses, the only reference appellant ever made about counsel was his off-hand remark, after his final interview in Norfolk, concerning whether Mr. Decker would "handle" the case. Had appellant timely communicated to any official, military or civilian, his preference not to talk in the absence of counsel, military or civilian, I would have no hesitancy in concluding that he had exercised his Fifth Amendment right to counsel—with the consequential exclusion of later statements obtained as a result of police-initiated interrogation. That is to say—had appellant expressed even to *civilian* officials his desire to consult with *military* counsel prior to answering questions, I would find a Fifth Amendment invocation. However, these were not the circumstances of this case.

I obviously agree with Judge Sullivan, concurring in the result, that statements taken on July 31 and August 3, 1985, were voluntary and preceded by appropriate waivers of counsel. Therefore, a majority of the Court holds that the statements made by appellant on July 31 and August 3, 1985, were admissible in evidence.

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[18] In our opinion today we do not imply any retreat from the ruling in *United States v. McOmber*, 1 MJ 380, 383 (CMA 1976). That opinion, based on Article 27, Uniform Code of Military Justice, 10 USC § 827, held that "once an investigator is on notice that an attorney has undertaken to represent an individual in a military criminal investigation, further questioning of the accused without affording counsel reasonable opportunity to be present renders any statement obtained involuntary under Article 31(d) of the Uniform Code." Neither by their terms nor their legislative histories do Articles 27 or 31 apply to civilian investigations.

The decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

SULLIVAN, Judge (concurring in the result):

I agree with my Brother Cox's result because the circumstances of this case clearly show that the statements of appellant on July 31 and August 3 were voluntary and were preceded by appropriate waivers of counsel.

EVERETT, Chief Judge (dissenting):

At trial appellant moved to suppress the incriminating statements he had given to civilian detectives on July 31 and August 3. He contended that his right to counsel had been violated. The military judge denied the motion, but I conclude that he erred in doing so.

To place the issue in perspective, it should be recognized that the statement made on July 31 to Detective Griggs of the Chesapeake Police Department was the product of a lengthy joint investigation in which Griggs had been engaged with Special Agent Cashman of the Naval Investigative Service (NIS). In fact, the two investigators had travelled together to Italy in May 1985 and had jointly interrogated appellant and many others.

In late July, appellant had given an incriminating statement to another NIS agent and had been returned to Norfolk, where on July 28 the Navy had placed him in pretrial confinement. I agree with the lead opinion that this confinement did not initiate formal adversarial proceedings that would trigger Jordan's Sixth Amendment right to counsel, and it did not bring Article 27 of the Uniform Code of Military Justice, 10 USC § 827, into play. However, under *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the confinement created for appellant a Fifth Amendment right to counsel with respect

to any interrogation that followed while he remained in custody.[1]

On the morning of July 31, Jordan conferred for about 2 hours with Lieutenant Stallings, a military lawyer who had been assigned to represent him. The lead opinion observes that, pursuant to RCM 305(f), Manual for Courts-Martial, United States, 1984, Lieutenant Stallings was "assigned for the limited purpose of representing the accused only during the pretrial confinement proceedings before charges are referred." 29 M.J. at 184. However, this observation does not conform fully with the rule which, in its entirety, states:

> *If requested by the prisoner,* military counsel shall be provided to the prisoner before the initial review under subsection (i) of this rule. Counsel *may* be assigned for the limited purpose of representing the accused only during the pretrial confinement proceedings before charges are referred. *If assignment is made for this limited purpose, the prisoner shall be so informed.* Unless otherwise provided by regulations of the Secretary concerned, a prisoner does not have a right under this rule to have military counsel of the prisoner's own selection.

(Emphasis added.)

Under this language, military counsel shall be provided "[i]f requested by the prisoner." Therefore, assuming regularity and compliance with regulations, I infer that Lieutenant Stallings was assigned as counsel for Jordan because he was "requested" by appellant, who was then a

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[1] On July 31 military authorities released Jordan to the custody of Detective Griggs; the important thing is that, thereafter, he was still in police custody while being interrogated.

"prisoner." Secondly, even though counsel "may be assigned for the limited purpose of representing the accused only during the pretrial confinement proceedings," this language is permissive and indicates that counsel also may be assigned without any limitation as to his representation of the accused. Nothing in the present record of trial indicates that Lieutenant Stallings was assigned "only" to represent Jordan during the pretrial confinement proceedings.

Indeed, all the facts point in the opposite direction. There is no testimony that Jordan was informed that Lieutenant Stallings was assigned only for a limited purpose; and on the morning of July 31, Jordan and Lieutenant Stallings conferred for 2 hours—which would be an unusually long period of time if the assignment of counsel had been "for the limited purpose of representing the accused only during the pretrial confinement proceedings before charges are referred."

According to the undisputed testimony of Lieutenant Stallings, his supervisor—Commander West—had advised him that he was going to represent Jordan with respect to a murder charge; and, in turn, Lieutenant Stallings had communicated to Commander Grant, the staff judge advocate for the convening authority, that he "had been assigned as the detailed military counsel to represent Spencer Jordan." Commander Grant testified that Lieutenant Stallings had called at about 9:00 a.m. on July 31 and had informed Grant "that he represented Jordan and that he was going over to the brig to speak with Jordan."

This testimony makes clear and the judge found that—even though "Lieutenant Stallings was assigned because the accused was in a Navy brig"—the assignment was for the general representation of Jordan in connection with the murder charge.

The lead opinion states that Congress never intended by enacting Article 27 "to inject military counsel into state criminal matters." 29 M.J. at 185. This conclusion is probably correct; but it has little relevance here. In the first place, the right to counsel involved in this case derives from the Fifth Amendment—as interpreted by *Miranda v. Arizona, supra,* and applied to military law by *United States v. Tempia,* 16 USCMA 629, 37 CMR 249 (1967)—and not from Article 27 of the Code. Secondly, here the "state criminal matter" was the killing of one servicemember by another—misconduct which also was a serious military crime. Thirdly, because both Virginia statutes and the Uniform Code had been violated, state and military officials had been conducting a joint investigation from the outset. Finally, the challenged evidence ultimately was offered and received in a trial by court-martial—rather than in a state court trial.

The lead opinion also comments that, "[u]nless military counsel are authorized to practice in state courts by state authorities and are given leave from their military duties, they simply have no role in state criminal matters." 29 M.J. at 185. In the abstract, this observation may be correct; but again it does not pertain to the facts of this case. The misconduct which the state authorities were investigating was also a major crime under the Uniform Code of Military Justice; and instead of being "given leave," Lieutenant Stallings had been duly assigned by a military superior the duty of representing Jordan in connection with the military investigation of that crime. Furthermore, in view of the joint investigation by civilian and military investigators and the concurrent jurisdiction of state and military authorities over the crime, Lieutenant Stallings could not perform effectively his military duty of representing appellant without taking into account the investi-

gation by civil authorities and the possibility that Jordan might be prosecuted in a state court.

Under the *Miranda* rules, a suspect who is in custody and has requested counsel cannot be interrogated unless and until he has "initiated" a discussion. *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); *see Oregon v. Bradshaw,* 462 U.S. 1039, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983). It makes no difference that the request for counsel concerns one offense and the interrogation concerns another that is totally unrelated. *Arizona v. Roberson,* 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988). Therefore, even if we treat appellant's violation of Virginia law as completely separate from the military offense, *Roberson* teaches that a request for counsel in connection with the military offense would prevent civilian investigators from interrogating Jordan about the state crime, unless he "initiated" a discussion.

Under the language of RCM 305(f), it appears that Lieutenant Stallings was assigned to represent Jordan because appellant "requested" military counsel. Even if the request for counsel had been made only with respect to review of pretrial confinement, I believe that it would constitute a request for counsel within the meaning of *Edwards* and *Roberson*. By his request—whatever its form—Jordan made clear his state of mind that, in connection with the murder investigation and any related proceedings, he wished to have the assistance of a lawyer.

Under *Roberson*, it makes no difference that an interrogator is unaware of a suspect's earlier request for counsel. 108 S.Ct. at 2101. The focus is on the state of mind of the person questioned, rather than on that of the interrogator. Therefore, inferring as I do that Jordan made a "request for counsel" within the purview of *Miranda,* Detective Griggs was precluded from questioning him about the murder, unless appellant "initiated" the discussion.

In fact, Detective Griggs had every reason to believe that Jordan had "requested" a lawyer. On July 31, when he went to pick up appellant at the Navy brig, Detective Griggs had to wait for Jordan to finish his 2-hour conference with his lawyer, Lieutenant Stallings.

The lead opinion interprets *Miranda, Edwards,* and *Roberson* in a very narrow way; and apparently it concludes that, because there was no evidence of a specific "request" by Jordan for an attorney in connection with the military investigation of the homicide, he could thereafter be interrogated at will by Detective Griggs without providing him counsel. Presumably, the same result would follow if the subsequent interrogation had been by a military investigator.

I disagree with this interpretation. In my opinion, the Navy's assignment of Lieutenant Stallings to Jordan and acceptance of his services by Jordan constituted the "functional equivalent" of the request for counsel required by *Edwards* and *Roberson*. *Roberson* decided that the focus of attention is on the state of mind of the accused; and establishment of the attorney-client relationship in connection with the pending criminal charges revealed the same state of mind on Jordan's part that would have been demonstrated by a "request" for counsel. Although I do not believe that the Supreme Court has directly decided this issue, I am convinced that investigators—whether military or civilian—are precluded by *Miranda* from undertaking pretrial custodial interrogation of a suspect who is represented by an attorney, unless either the attorney gives consent or the suspect "initiates" the discussion.

Accordingly, I come to the conclusion that Jordan's statement to Detective Griggs on July 31 was inadmissible in a criminal trial—whether by court-martial or in a state court. This inadmissibility derives from the Fifth Amend-

ment and its implementation by *Miranda*'s "prophylactic" rules. By the same token, Jordan's statement to Detective Hazlette on August 3 was inadmissible because, after being assigned Lieutenant Stallings as his counsel, Jordan never "initiated" a discussion of the homicide with anybody. The erroneous reception of these statements in evidence requires reversing the decision of the Court of Military Review. Therefore, I need not discuss other aspects of the lead opinion.[2]

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[2] Of course, I am at odds with the gratuitous conclusion in footnote 5 of the lead opinion that *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), applies. *See United States v. Ravenel*, 26 M.J. 344, 349 (C.M.A. 1988) (Everett, C.J.).

APPENDIX F

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
200 STOVALL STREET
ALEXANDRIA VA 22332-2400

IN THE U.S. NAVY-MARINE CORPS
COURT OF MILITARY REVIEW

NMCM 86 1006

UNITED STATES

v.

SPENCER I. JORDAN, 223 88 6944
AIRMAN (E-3), U. S. NAVY

Decided 30 June 1987

BEFORE

C. H. MITCHELL J. T. GLADIS C. J. CASSEL

Sentence adjudged 22 October 1985. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander Naval Air Force, United States Atlantic Fleet, Norfolk, VA 23511-5188.

LCDR ROBERT J. SMITH, JAGC, USN, Appellant [*sic*] Defense Counsel

LtCol RICHARD E. OUELLETTE, USMC, Appellate Defense Counsel

LT J. CONYON GORDON, JAGC, USN, Appellate Defense Counsel

Capt H. C. LASSITER, USMCR, Appellate Government Counsel

CASSEL, Judge:

Contrary to his pleas, appellant was convicted by a General-Court Martial of conspiracy to commit robbery, in violation of Article 81, Uniform Code of Military Justice (UCMJ), two specifications involving the same murder alleged as violations of Article 118, UCMJ, the first alleging premeditation, with the words of premeditation excepted by the members, the second alleging "felony murder" by strangling the victim with a camera strap in the course of perpetrating a robbery of the victim, and one specification of robbery of the same victim as a violation of Article 122. The sentence adjudged and approved by the convening authority was confinement for life, a dishonorable discharge, total forfeitures and reduction in pay grade to E-1.

Appellant has assigned the following as error:

I

A. THE CONVENING AUTHORITY ABUSED HIS DISCRETION IN REFERRING APPELLANT'S CASE AS CAPITAL WHEN THERE WAS NO RECOMMENDATION BY THE ARTICLE 32 INVESTIGATION OFFICER.

B. THE CONVENING AUTHORITY'S ABUSE OF DISCRETION IN REFERRING THE CASE AS CAPITAL DEPRIVED APPELLANT OF THE SUBSTANTIAL RIGHT TO SELECT A FORUM CONSISTING OF MILITARY JUDGE ALONE.

II

APPELLANT'S CONVICTION OF FELONY MURDER CANNOT STAND WHERE HE

WAS CONVICTED BY LESS THAN THE 3/4 MAJORITY REQUIRED TO SENTENCE HIM TO LIFE IMPRISONMENT IN VIOLATION OF ARTICLE 52(b)(2), UCMJ, WHERE THAT SENTENCE IS THE AUTOMATIC MINIMUM UPON SUCH A CONVICTION.

III

THE TRIAL JUDGE ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS APPELLANT'S STATEMENTS OF 31 JULY 1985 AND 3 AUGUST 1985 MADE TO CIVILIAN POLICE DETECTIVES AFTER MILITARY COUNSEL WAS APPOINTED, AND APPELLANT REQUESTED COUNSEL.

A. *The 31 July interrogation was conducted by a civilian law official of the Commonwealth of Virginia and participated in by an agent of the military, requiring notice to appointed counsel.*

B. *The result of the 3 August interrogation was tainted by the failure to notify counsel on 31 July when the Navy agent participated.*

C. *The 3 August statement is inadmissible because of violation of Military Rule of Evidence 305(e).*

D. *The trial judge erred when he prohibited appellant from testifying on the limited issue of his conversations with detective Griggs about his military lawyer.*

IV

THE TRIAL JUDGE ERRED BY ADMITTING UNDATED LETTERS TO APPELLANT

FROM THOMAS HARDNETT UNDER MILITARY RULE OF EVIDENCE 803(3) TO SHOW THE EXISTENCE OF A PAST CONSPIRACY.

V

WHERE THE FORCE JUDGE ADVOCATE CONDUCTED A CONVERSATION WITH THE PRESIDENT OF THE COURT DURING THE TRIAL, APPELLANT'S TRIAL WAS INFECTED BY THE APPEARANCE OF COMMAND INFLUENCE WARRANTING THE GRANTING OF A MISTRIAL UPON APPELLANT'S MOTION.

VI

THE GOVERNMENT FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT ENTERED INTO AN AGREEMENT WITH THOMAS HARDNETT TO ROB GREGORY SWAFFORD.

VII

APPELLANT'S CONVICTION OF FELONY-MURDER CANNOT STAND WHERE THE GOVERNMENT FAILED TO PROVE THAT THE MURDER OCCURRED DURING THE COURSE OF A ROBBERY IN WHICH APPELLANT ACTUALLY PARTICIPATED.

VIII

THE MILITARY JUDGE ERRED BY FAILING TO INSTRUCT THE MEMBERS OF

THEIR DUTY TO DETERMINE THE WEIGHT TO BE ACCORDED APPELLANT'S CONFESSIONS AND ADMISSIONS, BASED ON THE CIRCUMSTANCES SURROUNDING THEM.

As was appellant's counsel at the oral argument, our attention is immediately drawn to assignment of error III, especially as it involves the interplay of Military Rule of Evidence 305(e) and 305(h)(1).

III

The following factual summary is necessary to understand our concern.

Appellant, Seaman Thomas Hardnett, his co-conspirator, and the victim, a Second Class Petty Officer, were assigned to Helicopter Antisubmarine Squadron 32 in Norfolk, Virginia. Appellant and the victim were in the same detachment and scheduled to deploy on the USS KIDD and all three resided in Barracks U-20 at Naval Station, Norfolk. The murder occurred on the weekend of 2-3 February 1985. The ship was to deploy with appellant and other members of the detachment about one week later. Just before the ship's departure, appellant and others were interviewed on 8 February by representatives of the Naval Investigative Service (NIS) for information concerning the apparent disappearance of the victim. Appellant was definitely not suspected of any offense at that time. The body of the petty officer was found in the waters of Chesapeake, Virginia on 3 April and an investigation commenced by Detective Griggs of the Chesapeake Police Force. At this time the NIS investigation also became a murder investigation. Both of these investigations were proceeding separately but with a certain amount of coor-

dination[1]. By the end of April it was apparent that some of the witnesses who had provided information in the original investigation would need to be re-interviewed. Since most of these were in the Navy and deployed there was need for coordination between the two investigations. Accordingly, representatives of each agency traveled to Gaeta, Italy to interview and re-interview witnesses. This included appellant, who produced a tape recording which was transcribed into a 48-page statement containing no admissions but enough glaring inconsistencies for the military judge to find that the investigator should have suspected appellant and given him an Article 31 warning. Since this was primarily an NIS Investigation with the civilian present the statement was suppressed. It should be noted that there were investigations by two sovereigns' investigators; both proceeding at the same time and obviously coordinated in some ways. The 8 May statement of appellant was obtained in Gaeta, Italy aboard the USS PUGET SOUND while other members of the squadron were interviewed at the Air Station in Naples, Italy.[2]

The Commonwealth's representative was Mr. Griggs, while the Navy representatives were the local NIS investigators and Brian Cashman, the agent who had originally opened the special investigation into the disappearance of the victim. A statement had been obtained from Hardnett,

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[1] Since there was a homicide and the body was located in Chesapeake, VA it is obvious that the commonwealth had jurisdiction. Since the victim was an active duty Navy man there is clearly authority for NIS to investigate; at least to determine enough facts for the lawyers to attempt to use their Crystal Ball to see if the military would also have jurisdiction; if so, then to attempt to decide which of the two sovereigns would prosecute. See Rule for Courts-Martial (R.C.M.), 201(d)(3).

[2] There were 26 or 27 people interviewed in Gaeta alone. (R. 49). There were other lengthy transcribed statements.

the other individual involved, but according to Mr. Griggs, at least, no one was a suspect at that time. In any event we agree with the explicit findings of the military judge (R. 168 et. seq.), in suppressing the 8 May statement when he found it did not have an adverse effect upon the actions taken on 22 and 23 July in Haifa, Israel. These interviews were done by NIS agents in the Mediterranean area at the request of Mr. Cashman after he had returned to the U.S. and evaluated his investigation including the information received from Hardnett.

On 22 July appellant consented to a search of his belongings and two letters from Hardnett were seized. He also consented to a polygraph and denied any knowledge of the murder on the 22nd. On the 23rd in a hotel in Haifa, after another advice of his rights, appellant admitted being present when Hardnett killed the victim. The next day the command (the Commanding Officer, USS KIDD) was briefed on the status of the investigation and made arrangements for appellant to return to the United States. He arrived in Norfolk on 26 July and was met there by representatives of NIS and Mr. Griggs of the Chesapeake Police Department. There were other interviews by NIS, and after spending at least one night in the Bachelor Officer's Quarters, appellant was confined at the Norfolk brig. Since he was confined, counsel was detailed, and on 31 July appellant met with his detailed defense counsel at the brig. Shortly thereafter, he was released to the custody of Mr. Griggs with a warrant for his arrest, who took him to Chesapeake and interrogated him. Subsequently, he was transferred to the Norfolk Jail; interviewed there on 3 August and charged there. On 12 August the charges in Norfolk were *nolle prossed* and he was returned to the brig. Subsequently military Charges were preferred and the Article 32 investigation commenced. Although unfortunately never clearly presented in the record, it is clear

that once appellant was identified as a participant in the murder that both the Commonwealth of Virginia and the U.S. Navy had jurisdiction. Venue in the Commonwealth courts would depend upon the situs of the murder, if known, otherwise the location of the body. The only real issue regarding jurisdiction was which civilian jurisdiction the military would coordinate its desires with: Chesapeake or Norfolk. It is obvious that Norfolk had no particular desire to prosecute if the Navy desired to do so.[3]

Appellant provided at least 11 different written statements to the varying investigators during the course of his way to court. In the first one he was not a suspect. The judge suppressed the second and allowed the next one. This assignment of error concerns the statement made to Mr. Griggs in Chesapeake and its admissibility. At the time appellant had military counsel appointed, the Command SJA knew of the appointment; so there was a duty upon anyone acting as an agent of the military to notify counsel of any intended interrogation under Military Rule of Evidence 305(e). There is also no doubt that Mr. Griggs was not an agent of the United States Navy so that in the absence of any "bad faith" on the part of Navy officials, the statement made to Mr. Griggs and also the statement made in more detail a few days later to Norfolk police would be admissible under the standard of Military Rule of Evidence 305(h)(1). By "bad faith" in this context I refer to the standards as enunciated in Military Rule of Evidence 305(h)(2) involving foreign interrogations which are used by analogy in the instance.

On 30 July 1985 the detailed counsel notified the SJA of the General Court-Martial convening authority of his ap-

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[3] See the testimony of the Commonwealth attorney for the city of Norfolk at pages 8 through 16. This was a defense witness on the issue of jurisdiction.

pointment and on the 31st met with appellant at the Navy Brig in Norfolk which is under the control of the Commander Naval Base, another GCM authority. Upon completion of this conversation appellant was released to Detective Griggs, who while waiting for appellant to be released, stated to the NIS agent that the military counsel had "no authority off the military base" and then, accompanied by the NIS agent, took appellant to the Chesapeake Jail where he was interviewed in detail after being properly informed of his *Miranda* rights and waiving them.

During the hearing on the Motion to suppress the statement to the Chesapeake authority (Mr. Griggs) on 31 July, the civilian counsel attempted to have appellant testify for the limited purpose of the conversation he had with Mr. Griggs regarding the detailed military counsel (R. 133). The military judge did not allow him to so limit his testimony. Appellant, citing Military Rule of Evidence 304(f), says this was error; we agree. While it can be argued that there was waiver of the error because of a failure to provide an adequate offer of proof, *United States v. Means*, 24 M.J. 160 (C.M.A. 1987), it seems apparent that appellant's testimony would have been similar to that already explicit in the record regarding Mr. Griggs's view of the power or authority of detailed Military Counsel. We need not address, in this case, the legal correctness of Mr. Griggs's views because viewing all of the circumstances, including the series of warnings and statements, the actual contents of the statements, and the stipulated facts, we still find that the statement was voluntary and would still be found to be voluntary in the U.S. District Courts and so, absent any "bad faith", also admissible in Courts-Martial Proceedings. We note in passing the 3 August statement which was not suppressed by the military judge was never expressly admitted at trial on the merits.

There is no doubt that since there is not a procedural rule in the civilian federal system similar to Military Rule of Evidence 305(f), requiring notice to counsel, the statement to Mr. Griggs on 31 July, and to the Norfolk Police on 3 August would be admissible in a U.S. district court. *Moran v. Burbine,* ____ U.S. ____, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986). There is no claim of, nor any evidence, to suggest a request by appellant for counsel until after the 3 August interview in Norfolk when he asked the reporter if he could call Peter Decker to see if he [Decker] was going to handle his case. (p. 3 of App.E.5 and R. 93) We find no issue of a noncompliance of a request for counsel so as to involve the holding of *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed. 378 (1981). The only remaining issue concerns whether or not there is any indication that the transfer to Commonwealth authorities, represented by Griggs on 31 July, was an attempt by Military Authorities to circumvent the requirement for Notice to Counsel. Our careful study of the record convinces us that there was no such attempt.[4]

[4] At first blush it might appear that Griggs because of his constant involvement would be an agent of the Navy. Far from it however, a closer study shows his position to be more opposed to that of Naval Authorities. It is this factor that makes the testimony of the SJA more understandable to me. I find it unbelievable that any senior judge advocate would doubt that there was personal military jurisdiction in this case from the facts known on 30 July, but there was clearly also jurisdiction in the Commonwealth Court of Virginia. The difficulty was which Commonwealth court would have venue and so which prosecutor's office would the SJA negotiate with. *See* Virginia Code Section 19.2-244 and 19.2-247. Chesapeake through Griggs, at least, had expressed a desire to prosecute, Norfolk apparently would prefer that the Navy do it. Thus the SJA faced the situation whereby both the Navy and the Commonwealth had jurisdiction and it was natural that only one would exercise it; and he had to know which prosecutor he needed to coordinate with. Viewed in that light, I can understand actions taken in the turnover on 31 July.

While agent Cashman was present at the 31 July interview, factually this was not participation, but more akin to being present at a foreign government investigator's interrogation in the context which applies in Military Rule of Evidence 305(h)(2).

As far as the other assignments of error are concerned, assignments of error I and II are rejected. There is no support for appellant's claim that the convening authority abused his discretion in referring this case without restriction, and so as capital. The additional requirements which appellant would put on the referral process should not be imposed by an intermediate court since they have no basis in the statute or the Rules. Additionally, appellant has not made any claim of prejudice, since there was no attempt to plead to a lesser included offense or to request trial, by way of pretrial agreement, by military judge alone. The law is well settled in this area. *United States v. Turner,* No. 85-4044 (NMCMR 8 August 1986) (pet. granted on another issue, 23 M.J. 406 (C.M.A. 1987). There has been nothing to change the propriety of *United States v. Walker,* 7 U.S.C.M.A. 669, 23 C.M.R. 133 (1957).

IV

As for assignment number IV, while *we* did not give the undated letters very much weight to show the existence of the conspiracy nevertheless, we find that they are relevant; thus the military judge did not err in admitting them.

V

We expressly disapprove the action of the Staff Judge Advocate in conversing with the president of the court. We agree with the military judge that a mistrial was not warranted. We expressly agree with his conclusion that there was no attempt to, or actual influence upon, the members. Accordingly, this assignment is rejected.

We specifically are convinced beyond a reasonable doubt of appellant's guilt of both conspiracy and felony murder and find that there was no requirement for an instruction on voluntariness of appellant's confession; nor was an instruction requested by the defense at trial. Thus we also reject assignments of error VI, VII, and VIII.

Although not specially raised by appellant we have considered the clemency recommendation of the members as well as the apparent multiplicity of the two murder specifications. We find that Specification 1 is now included within Specification 2. There is no effect on sentence. Accordingly, Specification 1 of Charge II is dismissed. The remaining findings of guilty are correct in law and fact and are approved; as is the sentence.

C. J. CASSEL

Senior Judge MITCHELL and Judge GLADIS (concurring in the result):

We concur in the result reached by Judge Cassel and his rationale, except for his treatment of issue III D. The accused cannot complain on appeal of the military judge's refusal to permit him to limit his testimony in the absence of an adequate offer of proof as to the substance of his testimony, barring which a determination of reversible error is precluded.

C. H. MITCHELL

J. T. GLADIS